This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

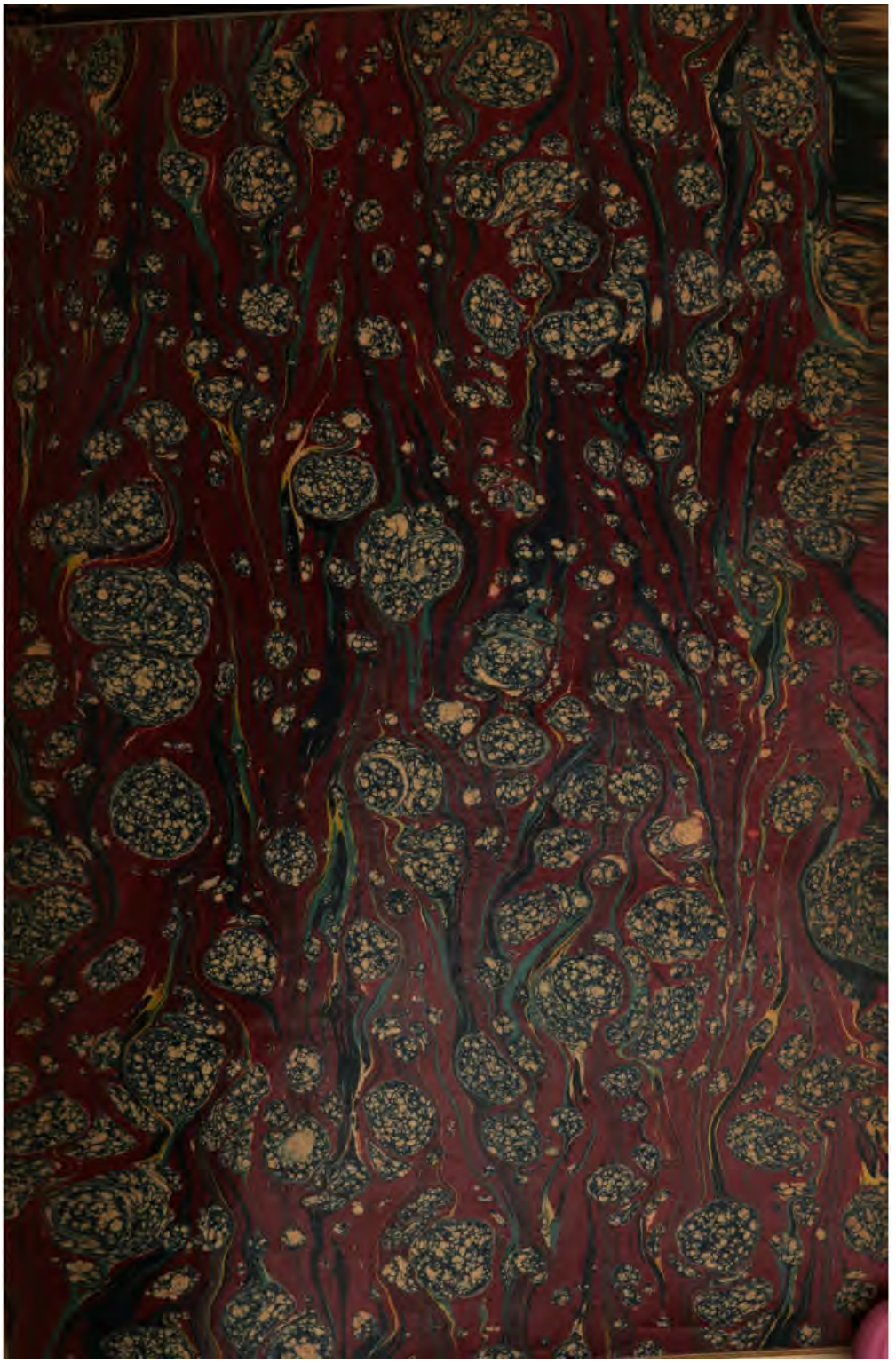
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HDI
HL 54KD .

HARVARD LAW LIBRARY

Received JUN 26 1908



THE

IRISH LAND REPORTS.

EDITED BY

HENRY MACAULAY FITZGIBBON, M.A.,
BARRISTER-AT-LAW.

VOLUME XII.—1907.

This publication contains full and revised Reports of all the important Current Cases bearing on the relation of Landlord and Tenant, decided either by the Superior Courts, the Chief Land Commission, the County Courts, or the Sub-Commission Courts.

DUBLIN:
JOHN FALCONER, 53 UPPER SACKVILLE STREET.
OFFICE OF THE "IRISH LAW TIMES AND SOLICITORS' JOURNAL."

1907.

JUN 26 1908

DIGEST OF REPORTS OF CASES.

PAGE

Re MARCUS B. ARMSTRONG.—Land Purchase Acts—Practice—Sales to the Congested Districts Board—Agent employed to negotiate sale—Negotiation fee—Land Act, 1903, ss. 23 (12), 79. (L. C.) 236

IN THE MATTER OF THE ESTATE OF JAMES ARMSTRONG, Continued in the name of ARTHUR HERBERT ORPEN.—Land Purchase Acts—Practice—Sale by absolute owner—Death of vendor—Will—Payment of residue to single executor. (L. C.) 100

IN THE MATTER OF THE ESTATE OF THE EARL OF BANDON.—Land Purchase Acts—Irish Land Act, 1903—Bonus—S. 48 (1)—Estate so incumbered that vendor is not entitled to receive for his own use any part of the rents and profits—Meaning of—Arrears of interest on incumbrances. (L. C.) 166

IN THE MATTER OF THE ESTATE OF THE EARL OF BANDON.—Land purchase—Reservation of mineral rights to Land Commission—Powers of Land Commission in respect thereof—Irish Land Act, 1903, s. 13 (3). (L. C.) . . 32

TRUSTEES OF ELIZA JANE BARRY, DECEASED.—Land Purchase Acts—Practice—Vesting order—Lands of another party included—Mistake—Rectification. (L. C.) 246

PAGE

IN THE MATTER OF THE ESTATE OF LOUISA MARY FRANCES BIRMINGHAM.—Land Purchase Acts—Practice—Superior interest—Distribution of purchase-money without regard to—Irish Land Act, 1903, s. 62—Land Act, 1896, s. 33 (4). (L. C.) 103

BOLAND'S ESTATE.—Land Purchase Acts—Head-rent—Redemption of—Indemnified lands—Exclusive charge upon other lands—S. 62 (3) of the Act of 1903. (Ross, J.) 193

IN THE MATTER OF THE ESTATE OF MARIANNE DOYLE AND ELIZABETH CAMPION.—Irish Land Act, 1903—Sale by absolute co-owners in fee-simple—Conversion—Death of one vendor—Executor entitled to moiety of deceased vendor. (L. C.) 156

CAREW *v.* FLYNN.—Action for rent or interest in lieu of rent—Purchase agreements signed—Motion to remit—Land Act, 1896, s. 35 (1). (App.) 116*n.*

CARROLL'S ESTATE.—Land purchase—Bonus—Insolvent estate—Solvent as to income—Insolvent as to capital—Board of Works charges—Irish Land Act, 1903, s. 48—Irish Land Act, 1904, s. 3. (L. C.) 16

CROSBIE, LANDLORD, *v.* NEILAN, TENANT; CROSBIE, LANDLORD, *v.* CREAN, TENANT.—Land Purchase Acts—Irish Land Act, 1903—Purchase price of holding—Arrears of rent—Inclusion of—Power of Land Commission to advance—Ss. 1, 24 (8). (App.) 1

PAGE

IN THE MATTER OF THE ESTATE OF THE REV. WILLIAM RADCLIFFE DOLLING.—Practice—Life annuity—Redemption of—Restraint on anticipation—Redemption price insufficient to produce income to satisfy annuity—Sale of stock to supply deficiency—Irish Land Act, 1903, ss. 16, 24 (4). (L. C.) 22

IN THE MATTER OF THE ESTATE OF THE EDINBURGH LIFE ASSURANCE CO.—Land Purchase Acts—Mining and mineral rights—Possession or enjoyment of vendor—Exclusion from sale—Irish Land Act, 1903, ss. 13 (3*b*), 99 (*a*), (*b*). (L. C.) 172

THE HON. MRS. J. C. G. EGERTON AND ANOTHER *v.* JOHN M'DERMOTT.—Land Law Acts—Appeal—Practice—Status of tenant—Objection on ground that portion of holding was sublet—Point not raised before Sub-Commission—Costs—Land Law (Ireland) Acts—S. 88 (3-5)—Rules of April 23, 1904. rr. 6, 7. (L. C.) 110

Re CHARLES EDWARD FAIR.—Land Purchase Acts—Practice—Tenant-for-life acting as solicitor—Profit costs—Trustee—Settled Land Act, 1882, s. 53. (L. C.) 219

HOLMES' ESTATE.—Land Purchase Acts—Bonus—Insolvent estate—Owner of the lands and of charges upon them—Absolute order for sale in force at date of passing of Act of 1903—Consent of the owner as to price—Irish Land Act, 1903, s. 48 (4). (App.) 10

PAGE

IN THE MATTER OF THE ESTATE OF A. J. HOWLIN.—Land Purchase—Allocation—Mortgage debt—Arrears of interest—Statute of Limitations—Land Act, 1903, ss. 16, 24. (L. C.) . . . 43

IN THE MATTER OF THE ESTATE OF R. INNES.—Land purchase—Redemption of superior interests—Costs of parties entitled—Sum retained insufficient. (L. C.) 28

IRISH LAND COMMISSION AND LORD LISTOWEL *v.* M'AULIFFE.—Land purchase—Interest—Recovery of—Invalid agreement—Whole sum not to be advanced—Purchase price. (Cir. Cas) 183

Re E. C. S. KING-HARMAN.—Land Purchase Acts—Land Act, 1903, s. 21—Turbary—Powers of Land Commission under. (L. C.) . . . 252

Re LOCAL REGISTRATION OF TITLE (IR.) ACT, 1891, AND FREEMAN.—Land Purchase Acts—Land Act, 1903, ss. 3, 54—Demesne lands repurchased by the owner—Holding—Restriction on power to charge or mortgage. (Madden, J.) . 198

Re WILLIAM DIGBY LONGFIELD.—Land Purchase Acts—Purchase of land by Congested Districts Board—Power of Congested Districts Board to contract—Enforceability of contract—Powers given by Congested Districts Board (Ir.) Act, 1893—Effect of Land Act, 1903, s. 70—Death of vendor before lands vested in purchasers—Who entitled to be certified as being the persons to be dealt with as

PAGE

owners—Portion of lands sold vested in trustees for sale—Whether trustees for sale or tenants-for-life should be certified—56 & 57 Vict., c. 35—3 Edw. VII., c. 37. (L. C.) 228

RE REV. JOHN LYLE.—Land Purchase Acts—Mines and Minerals—Land Act, 1903—Meaning of expression "time of sale" in s. 99—Mines being worked and developed by vendor within meaning of s. 99 (*b*)—Agreement reserving mines and minerals to vendor—3 Edw. VII., c. 37, ss. 13–99. (L. C.) 222

M'GLOIN *v.* IRISH LAND COMMISSION.—Land purchase—Order fixing fair rent—Power to deem a tenant to be a purchaser—Offer of Estates Commissioners—Act, 1903, s. 19. (Ross, J.) . . 152

MADDEN'S ESTATE.—Land Purchase Acts—Land Judge—Inadequacy of offer by Land Commission to Land Judge—Sale by public auction—One lot—Land Law (Ir.) Act, 1903, s. 7. (App.) . . 65

MINCHIN *v.* COSTELLO.—Drainage Acts—"Judicial rent"—"Increased rent" or drainage assessment fixed by Commissioners of Public Works—Not referred to in Land Commission proceedings—Liability for such assessment—Land Act, 1881, s. 5. (FitzGibbon, L.J.) 117

IN THE MATTER OF THE ESTATE OF J. B. G. MOORE.—Land purchase—Terminable fixed annual payments in lieu of tithe rent-charge—Redemption of—Payments made by vendor—Claim for recoupment out of purchase-money of sum representing capital paid off. (L. C.) . . 51

PAGE

MOORE *v.* M'CLINTOCK.—Land Law Acts—Town park—Application to fix a fair rent—Agreement fixing a fair rent signed twenty years before such application, but not filed—Effect of such agreement—Evidence—44 & 45 Vict., c. 49, s. 58 (2); 59 & 60 Vict., c. 47 (1). (App.) 72

O'LEARY *v.* SHERLOCK.—Character of holding—Erection by tenant of buildings for agricultural purposes—Annual value of such buildings exceeding annual value of lands—Building necessary for working of adjoining land held by tenant—Residential purpose—59 & 60 Vict., c. 47, s. 5 (1) (*a*). (App.) 129

IN THE MATTER OF THE ESTATE OF FRANCES MARY POWER.—Land Purchase Acts—Sale by tenant-for-life—Marriage settlement—Clause providing for settlement of after-acquired property—Bonus—Land Act, 1903, s. 48—Land Act, 1904. (L. C.) 92

Re CRAMER ROBERTS.—Land Purchase Acts—Assignee of tenant-for-life—Joint vendors—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 50—Land Act, 1903, s. 48—Bonus. (L. C.) 249

J. ROCHE, LANDLORD; J. FITZPATRICK, TENANT.—Letting in conacre—Whether a subletting when not confined to green crops—Land Act, 1881, ss. 2, 5—Tenant in occupation of the holding—Application to fix fair rent. (L. C.) 238

SHAFTESBURY'S ESTATE.—Land purchase—"Separate estate"—Discretion as to declaration of—Holdings excluded from sale—Resumption by

PAGE

landlord—Building lots—Purchase price—Zones—Payment of Bonus. (L. C.) 55

IN THE MATTER OF THE ESTATE OF RICHARD W. SMITH.—Land Purchase Acts—Irish Land Act, 1903—Practice—Redemption of terminable annuity—Redemption price. (L. C.) . 164

IN THE MATTER OF THE ESTATE OF SIR J. H. STRONGE, BART.—Land purchase—Apportionment of superior rent—Redemption of part apportioned on lands sold—Security—Personal covenant for payment of rent—Land Act, 1903. (L. C.) 37

Re H. J. B. VILLIERS STUART.—Land Act, 1903—Practice—Right of way—Yearly payment to owner of servient tenement—Superior interest—Redemption. (L. C.) 241

IN THE MATTER OF THE ESTATE OF THOMAS TAYLOR.—Land Purchase Acts—Practice—Head rent—Redemption—Consent to price by trustees—Objection to price by tenant-for-life—Redemption price fixed by the Court. (L. C.) . 177

IN THE MATTER OF THE ESTATE OF EDWARD THOMSON.—Landlord and tenant—Land purchase—Redemption of rent—Apportionment—Right of indemnity—Priority—59 & 60 Vict., c. 47, s. 33 (4). (App.) 82

TIGHE *v.* BARRON.—Landlord and tenant—Action for rent—Right to maintain action when purchase agreements have been signed and lodged—Land Act, 1896, s. 35 (1). (FitzGibbon, L.J.) . . 114

PAGE

TYRRELL'S ESTATE.—Land Purchase Acts—Superior interest—Redemption price—Option to re-purchase—Rule against perpetuities. (Ross, J.) 89
(App.) 136

Re COLONEL C. W. WARDEN.—Land Act, 1903—Congested estate—Purchase of by Land Commission—Prospect of loss on re-sale—S. 6 (4)—S. 44—Expenditure necessary for improvements—Reserve Fund—Recoupment of—S. 43—Enhanced price. (L. C.) 202

WILKINS *v.* M'GINITY.—Landlord and tenant—Notice of surrender—" Three months' notice beforehand "—Length of notice—Legal or calendar months. (App.) 143

WOLFE'S ESTATE.—Land Purchase Acts—Negotiation of sales to tenants—Solicitor—Receiver—Remuneration. (Ross, J.) 87

WYNNE *v.* SWEENY.—Land Law (Ireland) Acts—Practice—Originating notice—Application to transfer proceedings from Civil Bill Court—Notice showing cause against transfer—No affidavit in support of grounds specified—Costs—Rules of Jan., 1897, rr. 72, 74 and 76. (L. C.) 107

INDEX TO LAW CASES.

PAGE

Action for rent; purchase agreements signed . . 114
Agent; negotiation fee 236
Appeal 110
Apportionment 82
Apportionment of superior rent 37
Arrears of interest on incumbrance . . . 166
Arrears of interest 43
Arrears of rent, inclusion of 1
Assignee of tenant-for-life; joint vendors . . 249
Board of Works' charges 16
Bonus 10, 16, 55, 167, 249
Bonus; marriage settlement; after-acquired property 92
Buildings for agricultural purposes 129
Building lots; resumption 55
Character of holding 129
Conacre, letting in 238
Congested Districts Board; powers of, to contract . 228
" " purchase by . . 228, 236
Congested estate 202
Conversion 156
Costs 107, 219
Costs; redemption 28
Covenant, personal, to pay rent 37
Death of vendor 100, 228
Death of one vendor 156
Demesne 198

PAGE

Drainage Acts; increased rent 117
Enhanced price 202
Evidence 72
Exclusive charge of head-rent; indemnifying lands . 193
Expenditure on improvements 202
Fair rent, fixing 72, 238
Fair rent, order fixing 152
Fee, agent's 236
Head-rent, redemption of 193
Holding 198
Holdings excluded from sale 55
Improvements, expenditure on 202
Indemnified lands 193
Indemnity, right of 82
Insolvent estate; bonus 10, 16
Interest; purchase agreement 180
Interest, recovery of 183
Invalid agreement for purchase 183
Joint vendors 249

LAND ACT, 1881—
ss. 2, 5 238
s. 5 117

LAND ACT, 1896—
s. 33 (4) 103
s. 35 (1) 114

LAND ACT, 1903 . . . . . 156, 164
ss. 1, 24 (8) 1
ss. 3, 54 198

PAGE

LAND ACT, 1903, *continued*—
ss. 6 (4), 43, 44 202
s. 7 65
s. 13 32
ss. 13 (3*b*), 99 (*a*, *b*) 172
ss. 16, 24 . . . . . 22, 43
s. 19 152
s. 21 252
ss. 23 (12), 79 236
s. 48 . . . . . 16, 92, 249
s. 48 (1) 166
s. 48 (4) 10
s. 57 180
s. 62 103
s. 62 (3) 193
s. 79 228
s. 99 222

LAND ACT, 1904 92
s. 3 16

Land Commission, powers of, as to turbary . . 252
Land Purchase 136
Liability to drainage rent 117
Life annuity, redemption of 22
Loss on re-sale by Land Commission . . . 202
Mines and minerals 222
Mining and mineral rights 172
Mineral rights; reservation to Land Commission . 32
Mistake in order; rectification 246
Month's notice, legal or calendar 143
Mortgage debt; arrears of interest . . . 43

PAGE

Notice of surrender 143
Offer of Estates Commissioners 152
Offer of Land Commission to Land Judge . . 65
Order for Sale 10
Originating notice 107
" Owners " in case of death of vendor . . . 228
Perpetuities, rule against 89
Practice 22, 100, 103, 107, 110, 164, 176, 219, 236, 243, 246
Priority 82
Profit costs 219
Purchase by Land Commission 202
Purchase-money, distribution of 103
Purchase price 1, 183
Receiver; sale; remuneration 87
Recoupment of reserve fund 202
Redemption of superior interests 203
" " " costs . . . 28
" " " head rent 37, 82, 177, 193
" " " price . . 89, 136
" " " terminable amount . 164
" " " tithe rent-charge . 51
Rent; interest; purchase agreement . . . 180
Re-purchase of demesne by owner 198
Reserve Fund 202
Residential purposes 129
Restraint on anticipation 22
Restriction on power to charge or mortgage . . 198
Right of way 243
Rule against perpetuities 136
Rules, Jan., 1897, rr. 72, 74, 76 107
" April 23, 1904, rr. 6, 7 110

PAGE

Sale by absolute co-owners 156
Sale by Land Judge 65
Sale by public auction 65
Sale by tenant-for-life 92
Sale; death of vendor 100
Sales, negotiation 87
Sale of stock to satisfy deficiency of income . . 22
"Separate estate" 55
Settled Land Act, 1882, s. 50 249
" " " s. 53 219
Solicitor; costs 219
Solicitor; remuneration, sales 87
Status of tenant 110

STATUTES—
44 & 45 Vic., c. 49, s. 58 (2) 72
56 & 57 Vic., c. 35 228
59 & 60 Vic., c. 47 72
" " " s. 33 (4) 82
" " " s. 5 (1*a*) 129
3 Edw. VII., c. 37 228
" " " s. 13 99

Statute of Limitations 43
Subletting 110, 238
Sum retained for costs insufficient 22
Superior interest 28, 37, 51, 82, 89, 103, 164, 177, 193
Superior interest; right of way . . . 136, 243
Tenant a purchaser, power to deem a 152
Tenant-for-life acting as solicitor 219
Tenant in occupation 238
"Time of sale" 222

PAGE

Tithe rent-charge, redemption of 51
Townpark 72
Transfer from Civil Bill Court 107
Trustee 219
Trustees for sale 228
Turbary 252
Vesting order, mistake in 246
Zones 55

IRISH LAND REPORTS.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, Bart., L.C., FITZGIBBON and HOLMES, L.JJ.)

CROSBIE, Landlord, *v.* NEILAN, Tenant;
CROSBIE, Landlord, *v.* CREAN, Tenant.

APPEAL.
Jan., 1907.

Jan. 15, 28, 1907.—*Land Purchase Acts—Irish Land Act,* 1903—*Purchase price of holding—Arrears of rent—Inclusion of—Power of Land Commission to advance—Ss.* 1, 24 (8).

The purchase price of a holding on an estate sold under the Irish Land Act, 1903, *may include a sum in respect of arrears of rent due in respect of the holding at the date of the purchase agreement, and such sum may exceed in amount one year's rent. The Land Commission, in cases within the zones, must advance such sum as part of the purchase-money repayable by a purchase annuity, and the percentage under s.* 48 *is payable in respect thereof.*

Questions submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The vendor, who was absolute owner

APPEAL.
Jan., 1907.

of the estate, had entered into agreements for sale direct to the tenants. The purchase agreements and applications for the advance of the sums agreed upon as the prices of the holdings comprised in the estate were lodged with the Land Commission on June 20, 1904, and the Estates Commissioners had provisionally declared the lands for sale an estate for the purposes of the Act. John Neilan, one of the purchasing tenants on the estate, who had been tenant to the vendor of his holding at a rent of £38, fixed by a fair rent agreement for a second statutory term, had, on June 2, 1904, agreed to purchase the holding for the sum of £1,034. Immediately prior to the signing of the purchase agreement there were arrears of rent due by John Neilan amounting to the sum of £228. It was admitted that the purchase price of £1,034, which was within the zones, included the sum of £59, part of the total arrears of rent due. The following questions were submitted:— 1. Whether the entire of the said sum of £59 or any portion thereof can be included in the advance to be made out of the Land Purchase Fund to the said tenant? 2. In the event of its being decided that an advance can be made of the said sum of £59, or any portion thereof, do the provisions of s. 1 (1) apply? 3. In the event of its being decided that an advance can be made of the said sum of £59, or any portion hereof, would the percentage payable on the purchase-money be payable on the said sum of

£59 or such portion thereof as was advanced? 4. In the event of its being decided that an advance cannot be made of the said sum of £59, or any portion thereof, then is the said purchase agreement wholly void and inoperative as between the parties thereto? Jeremiah Crean, another of the purchasing tenants who had been tenant to the vendor of his holding at a rent of £40, fixed by a fair rent agreement for a second statutory term, filed in the Land Commission on April 26, 1904, had agreed on June 2, 1904, to purchase his holding for the sum of £1,015. The arrears of rent due by the said Jeremiah Crean immediately prior to the signing of the agreement amounted to the sum of £105 8s. 9d. The purchase price of £1,015, which was within the zones, included £30, part of the total arrears of rent due. Questions were submitted in this case similar to those in the case of John Neilan.

The Attorney-General (*Cherry*, K.C.), *The Solicitor-General* (*Barry*, K.C.), and *Dudley White* for the Treasury.

Jellett, K.C., and *Maxwell* for the vendor.

Cur. adv. vult.

SIR S. WALKER, L.C.—The facts of this case are not disputed, and it raises an important question on s. 1 of the Irish Land Act, 1903. Mr. Crosbie, who was the absolute owner of his estate, entered into an agreement in June, 1904, with John Neilan, a tenant of his, for the sale of his holding. It was agreed that where the estate

APPEAL.
Jan., 1907.

came under the provisions of the Act the landlord would agree to sell to the tenant for £1,034. The tenant was to apply to the Land Commission for the advance, to be repaid at the rate of £33 12s. 6d. Neilan held at a rent of £38, second statutory term. Mr. Crosbie has made an affidavit in which he has set out in the most candid manner the negotiations and basis of the agreement. The basis of the sale was that first term tenants should receive a reduction of thirty per cent., and the second term tenants twenty per cent., the half-year's rent which was then payable either to be paid in cash or added to the purchase-money at the tenant's option, arrears to be liberally dealt with on the merits of each case. Mr. Crosbie said that the tenants were able to calculate the price for themselves. The actual amounts he was contracting to pay differed therefrom by reason of the half-year's rent and arrears coming into the calculation. There was no purchase-money except the one sum, the resultant of these calculations. Neilan, who was to get twenty per cent. off the rent of £38, was liable for an annuity of £30 8s., representing a capital sum of £935; to this was added £19 for half a year's rent then payable, and £40 in full satisfaction of the arrears of rent, then amounting to £228. The total purchase-money included the sum of £59, part of the total of arrears due by the tenant at the date of the signing of the agreement. The Estates Commissioners, for the purpose of ascertaining the law on the point, submitted a

memorandum to the Judicial Commissioner, asking whether the entire sum of £59, or any part of it, could be included in the advance. He decided that the entire sum could not be included, but that £38, the equivalent of one year's arrear of rent, might be included in it. From that decision the present appeal is taken. The Treasury contend that the £59, being arrears of rent, could not be added to the purchase-money or included in the advance, and that the provisions of s. 1 do not apply, inasmuch as the whole purchase-money agreed on could not be advanced; and there is a cross-appeal by the vendor on the ground that the section applies to the whole purchase-money agreed on, and that the bonus percentage is payable on the £59. Before the Act of 1903 the Land Commission were not bound to make the advance unless they were satisfied with the security, but it is now obligatory to make it in all cases coming within s. 1 (1) and (2). The same words are used—"holding" and "purchase-money" or "price"—in s. 1 as in the earlier legislation. "Holding" is a parcel of land held under a contract of tenancy; it is a rent-producing subject which may have arrears attached to it as a liability affecting that holding. When a tenant owes an arrear in respect of his holding, and asks his landlord to sell, he cannot expect that he can get it for the same price as if he owed none, especially in view of the fact that the agreement discharges the arrear due. The arrear is not an

APPEAL.
Jan., 1907.

element foreign to the price, nor can it be considered as a mere personal debt due to the landlord, like the price of goods sold and delivered or a promissory note. Naturally it would be a matter to be regarded where the landlord was parting with the holding. I do not think it possible to contend that the landlord is bound to estimate the price of each holding as if there was no arrear due, and if it were a legitimate subject to be entertained it was legitimate to consider it in arriving at the price. The object of the legislation was to give an inducement to the tenant-for-life to sell, discharged from arrears by force of the agreement, by granting him a charge on the purchase-money for one year's arrears. It was not contended that, apart from the language of the affidavit, the agreement could be gone behind when a purchase price was specified. It follows that the appeal of the Lords of the Treasury fails, and the cross-appeal by the vendor must be allowed. The Court in such a case is disabled from giving any costs.

FITZGIBBON, L.J.—We must have regard to the candid statement of Mr. Crosbie as to the mode in which the amount of the purchase-money was arrived at and made payable. It has been objected on the part of the Treasury that the rent actually due passed as it were from being part of the holding into a mere personal debt, and ought to be altogether excluded from consideration in ascertaining the purchase price of

the holding itself. I wholly fail to see how the condition of the tenant's rent could not have an effect on the fixing of the price of the interest in the land. If it is one of the elements that would be taken into consideration in fixing the price, then whatsoever may be due becomes part of the consideration for the contract, and part of the purchase price. No doubt arrears are capable of being separately considered, but they are not necessarily so. I will deal principally with Crean's Case, because I think it is a *reductio ad absurdum* of the argument that has been put forward in Neilan's Case—assuming always that there was a *bona fide* sale as the result of all matters taken into consideration by both sides. There must always be some arrears of rent due unless the whole negotiation for purchase is carried through and concluded on a gale day. If arrears are thus due, the tenant's interest in the holding may be considerably depreciated if there is about to be a sale, because he may owe such arrears as may leave him liable to eviction and distress. The landlord has then the remedies of a creditor, and also his rights and remedies as to arrears of rent. There is, in addition to other arrangements as to arrears, usually an agreement that the tenant must reduce his arrears to a certain degree of solvency—*i.e.*, he must pay off a certain amount of the arrears. But the simplest and most important step which is frequently taken by a landlord is to get from his tenants such a number of years' purchase as will make up,

APPEAL.
Jan., 1907.

irrespective of how each man stands, the amount of the prescribed price. But then there occurs this difficulty, that some tenants owe very large arrears and others none at all, with the effect that unless some special arrangement be made the latter pay the same number of years' purchase as the former. Is there anything wrong or unjust in saying that tenants who owe arrears, and have therefore less interest in their holdings, shall pay a higher price for purchasing their farms than those who owe nothing? The object of the Act of 1903 was to enable tenants to buy and landlords to sell. Yet the idea has been put forward that each agreement should have been dealt with separately and independently, and we are asked by the Treasury to hold that no estate can be sold in which there has been any differentiation in the prices allowed on the ground that this was not contemplated by the Act. Meredith, J., appears to have been very much impressed by s. 24 (8), the effect of which, he held, was to legalise in some way the addition of a year's rent to the purchase-money. That section seems to me to have a very different effect on the question now being considered. It prevents the person who is being paid out of the purchase-money from being given more than is just. It is for him to fix the amount of the purchase price, having regard to that section, but it has nothing to do directly with including arrears of rent in the amount of the purchase price, beyond being a plain recognition of the introduction into the

calculation of the purchase-money of the consideration of arrears in general. It was to prevent a limited owner, when segregating the purchase-money, from keeping for himself more than was just, and more than a fixed proportion. It does not limit the amount of arrears that may be taken into consideration when fixing the purchase price. Care should, however, be taken that the price thus fixed is not brought outside the limits of the zones.

HOLMES, L.J., gave judgment to the same effect.

Solicitor for the Treasury : *W. M. Lane.*

Solicitors for the vendor : *Creagh & Byrne.*

[*Note up on pp.* 1053 *and* 1088 *of Cherry and Maxwell's Irish Land Acts,* 1903–1904.]

COURT OF APPEAL.

(Before SIR S. WALKER, L.C., FITZGIBBON and HOLMES, L.JJ.)

HOLMES' ESTATE.

APPEAL.

Jan., 1907.

Jan. 16, 28, 1907.—*Land Purchase Acts—Bonus—Insolvent estate—Owner of the lands and of charges upon them—Absolute order for sale in force at date of passing of Act of* 1903—*Consent of the owner as to price—Irish Land Act,* 1903, *s.* 48 (4).

A vendor was the owner of a fee-simple estate over which an absolute order for sale by the Land Judge was in force at the date of the passing of the Land Act, 1903. *After the passing of that Act the petition for sale was dismissed, and the estate sold to the tenants under the Act of* 1903. *The vendor was the owner of the estate, subject to two charges created by a will—one in favour of himself, and the other in favour of his sister. The purchase-moneys of the estate were entirely unable to pay off these two charges :*

Held (HOLMES, L.J., *dissenting*), *that although, with reference to the vendor as owner of the estate, it could be sold without his consent as to price, yet, in respect to the vendor as owner of one of the charges upon the estate, it could not be sold without his consent as to price, and that in his latter capacity,*

as owner of the charge, s. 48 (4) *of the Act of* 1903 *did not apply, and therefore the bonus was payable to him absolutely.*

By his will dated March 13, 1845, Garner Joseph Holmes devised the lands of Lisduff, in Co. Tipperary, to William Anthony Holmes absolutely subject to two charges—one in favour of the present vendor, Garner Edmond Holmes, for £1,330, and the other of £2,500 in favour of Matilda Elizabeth Holmes, now Mrs. Balston. There was now due a further sum of of about £2,000 for interest to the vendor upon foot of his charge of £1,330. William Anthony Holmes died in 1863, and by his will devised the lands of Lisduff to his wife Sophia Holmes for life, remainder to Garner Edmond Holmes. Sophia Holmes died in 1886, and prior to her death—viz., on July 28, 1885—a petition was presented in the Land Judges' Court by Garner Edmond Holmes, and an absolute order for the sale of the lands of Lisduff was made on foot of his charge of £1,330, and a Receiver was appointed in the matter. Upon the death of Sophia Holmes, the predecessor-in-title of Garner Edmond Holmes, the Receiver, was discharged, and Garner Edmond Holmes went into possession of the lands and receipt of the rents and profits thereof, and continued to do so down to the time of the sale of the lands in the present proceedings, the rents and profits being divided between him and Matilda Elizabeth

APPEAL.
Jan., 1907.

Balston in proportion to the amount of their two charges. On March 22, 1904, the Land Judge dismissed the petition upon which the absolute order for sale was made. By an indenture of August 8, 1904, made between Garner Edmond Holmes, as absolute owner in fee-simple, and Matilda Elizabeth Balston, it was agreed that upon the sale of the lands under the Act of 1903 the net purchase-money, after deduction of superior interests, should be divided between them in proportion to their respective charges of £1,330 and £2,500, and that the bonus should be divided between them in equal moities. The purchase-moneys of the estate amounted to £3,084, which had been advanced by the Land Commission. Exclusive of the two charges in favour of Garner Edmond Holmes and Matilda Elizabeth Balston, the purchase-moneys were amply sufficient to discharge the superior interests appearing upon the allocation schedule. Under these circumstances the only point raised by the Treasury was whether the bonus was entirely forfeited.

The Attorney-General, K.C., *The Solicitor-General*, K.C., and *Dudley White* for the Treasury.

O'Connor, K.C., and *Redmond Carroll* for the owner.

Cur. adv. vult.

SIR S. WALKER, L.C.—The question in this case is whether the bonus is payable on the sum of £3,084 advanced as purchase-money by the Land

Commission, and it turns upon the true construction of s. 48 (4). [Reads.] *Primâ facie* the case comes within the first clause of s. 48 (1), and therefore the bonus is payable unless it is shown not to be so. The section relied on as taking it out of that clause is s. 48 (4). G. E. Holmes is the owner, and he is also interested in the price of the estate to the extent of his charge. Is the estate so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price? The word "consent" refers to the practice of the Court. [Refers to *Grogan's Estate*, [1896] 1 Ir. R. 614.] Mr. Justice Ross has now been some eleven years on the Bench as Land Judge, and he has clearly stated what he considers to be the practice of that Court, and that in the present instance the owner would be consulted as to the price. [Refers to *Howlin's Estate*, XI. Quarterly Land Reps. 184.] Another important question arises on the meaning of "owner" in s. 48 (4). I think you must look at the owner in his every capacity in which he would have an interest in the price; and that, according to the practice, G. E. Holmes would be treated as having a voice in what price was to be accepted. The decision of Mr. Justice Ross was right.

FITZGIBBON, L.J., concurred.

HOLMES, L.J., in the course of his judgment, in which he dissented, said that as to the meaning of the words "without the consent," counsel for

APPEAL.

Jan., 1907.

the respondent treated it as equivalent to "without consulting the owner." But that could hardly be what was intended by the legislature. The only way in which the Land Judge could consult the owner as to price was by hearing his views on the matter, and considering them; that assumed that he might either accept or reject them; if the owner could stop the sale by saying that he did not consent to the price, there was nothing to consult him about. Therefore he interpreted the words as referring to cases where, by the practice of the Court, the consent of the owner was not a condition precedent to a sale. He then proceeded to consider the class of estates that fell within the exception, and said undoubtedly an encumbered estate was within it. Where the owner was the only person interested in the sale, the Land Judge ought not, and would not, sell in accordance with the practice of his Court without his consent. But unencumbered estates in Ireland were few and far between, and, in interpreting s. 40 of the Act of 1896, it was held that it was not confined thereto. In the case of solvent estates it was not usual to sell the whole of the estate without the owner's consent. He held that where there was no receiver appointed, and where the estate was solvent, s. 40 did not apply. He was disposed to think that this was what was intended by the legislature, and as that interpretation had been acted upon he was unable to offer any better solution, and he willingly

adopted it. Was, then, the estate in question so solvent in the following year when the petition for sale was dismissed ; it was certain that it was not. The estate was excluded by sub-s. 4 of s. 48 from the benefit of sub-s. 1.

Solicitor for the Treasury : *W. M. Lane.*

Solicitors for the owner : *Meldon & Co.*

[*Note up on p.* 1110 *of Cherry and Maxwell's Irish Land Acts,* 1903–1904.]

LAND COMMISSION.

(Before Ross, J.)

CARROLL'S ESTATE.

LAND COMMISSION.

Nov., 1906.

Nov. 14, 1906.—*Land purchase—Bonus—Insolvent estate—Solvent as to income—Insolvent as to capital—Board of Works charges—Irish Land Act*, 1903, *s.* 48—*Irish Land Act*, 1904, *s.* 3.

At the time of the passing of the Land Act, 1903, *an estate was in the Land Judge's Court, and an absolute order for its sale was in force. The estate was then insolvent both as to capital and income. In* 1904 *the estate was sold by the Land Judge to a purchaser, who subsequently sold the estate to the occupying tenants under the Act of* 1903. *Upon the allocation of the purchase-money there was a narrow margin of solvency as to income, but the estate was insolvent as to capital, being unable to pay the redemption value of two terminable Board of Works charges:*

Held, *that by reason of s.* 3 *of the Act of* 1904 *the vendor was absolutely entitled to the bonus, although there was no purchase-money to meet the Board of Works charges.*

George Samuel Ottley was, prior to the passing of the Irish Land Act, 1903, the owner of six different properties situate in the counties of

Limerick and Cork; the lands, the subject-matter of the present proceedings, were the lands of Rockfort, situate in the County Cork. The entire of these lands, as long as they were owned by Ottley, were admittedly insolvent both as to capital and income, and an absolute order for their sale by the Land Judge was in force at the date of the passing of the Land Act of 1903. On July 15, 1904, the lands of Rockfort were sold in the Land Judge's Court in the matter of the estate of George Samuel Ottley, and purchased by J. H. Carroll, deceased, for £400, and his devisees and executors (hereinafter called the vendor) were completing the sales to the tenants in the present proceedings. The lands of Rockfort comprised 155 acres, and were held under a head rent of £97 10s. and were charged with two Board of Works loans repayable by the vendor, terminable respectively in 1915 and 1917, and if redeemed their redemption price would be £178, as appeared from the certificate of the Board of Works. J. H. Carroll, deceased, sold the lands of Rockfort to the occupying tenants under the Irish Land Act, 1903, for £2,650. The owner of the head rent objected to this price, as the holdings had not been sold within the zones, but the inspector of the Estates Commissioners reported a fair price had been obtained. The lands of Rockfort were now solvent as to income; the vendor stated the margin of solvency to be about £36, and the Crown contended the margin of solvency was about £17. But it was conceded by all the

LAND COMMISSION.

Nov., 1906.

various parties that there was a margin of solvency as to income. The lands of Rockfort, which had been declared an "estate" by the Estates Commissioners, were admittedly insolvent as to capital, as they were insufficient to pay the redemption value of the two terminable Board of Works charges. Exclusive of these two terminable charges the estate was solvent as to capital.

H. D. Conner, K.C., with him *W. S. Norwood*, for the vendor.—The vendor is entitled to the bonus absolutely. The contention of the Treasury that no bonus is payable rests upon the definition of "estate" in s. 98 of the Act of 1903. That definition does not apply to s. 48 (4). The proviso to s. 48 (1) does not apply, and, consequently, the bonus is not to be added to the purchase-money, as the Board of Works contend. Sec. 3 of the Land Act of 1904 governs the matter, and shows the vendor is entitled to the bonus absolutely. They referred to s. 31 of the Act of 1896; s. 7 of the Act of 1903; *Ely's Estate*, IX. Quarterly Land Reps. 22; [1904] 1 Ir. R. 66; *Minhear's Estate*, IX. Quarterly Land Reps. 188. The charge of the Board of Works is not a superior interest.

[ROSS, J., referred to the definition of superior interest in s. 31 (8) of the Land Act of 1896.]

The Solicitor-General (*Barry*, K.C.), with him *Dudley White*, for the Treasury.—Sub-s. 4 of s. 48 applies. No bonus is payable, as an absolute

order for sale by the Land Judge was in force at the date of the passing of the Land Act of 1903, and the estate would, independently of the Act of 1896, be sold without the consent of the owner as to price.

Edmond Coll for the Board of Works.—This is an insolvent estate. The bonus should be added to the purchase-money.

Ross, J.—I am of opinion that although there is a great deal of difficulty in this case, on the whole what I ought to do is plain enough. The Act of Parliament recognises it is for the public good that a pecuniary inducement should be given to sell estates to tenants. A pecuniary inducement is required for the sale of solvent estates, where an owner's income would be lessened in the event of sales to the tenants. It is still more required when dealing with insolvent estates, for if an owner thought he would get nothing he would make no effort to sell his property. The first part of s. 48 of the Act of 1903 establishes, as regards all estates, solvent estates or insolvent estates, that an inducement to sell should be given. Sub-s. (4) of s. 48 makes a number of exceptions, and unless the Crown can bring themselves within some one or other of these exceptions the bonus cannot be withheld. The Crown say that this property comprises an " estate so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to

LAND COMMISSION.

Nov., 1906.

price," and "in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of the Act of 1903." This contention can only hold good on the basis that the word "estate" means the lands, but the definition of the word "estate" which is to be found in s. 98 cannot be made to apply to a section dealing with such provisions as s. 48 does. Sec. 48 deals with an estate which is the subject of an absolute order for sale in the Land Judge's Court. Estate in this Court does not mean lands, but only the particular interest of some person in the lands. At the time of the passing of the Act of 1903 it was the estate of Ottley, but when it gets into the hands of a subsequent purchaser it is not the "estate" but a different estate. I cannot hold that this is a blot upon the land which prevents the bonus for ever from being payable. The subsequent purchaser requires an inducement to sell the estate to the tenants, and the argument of the Crown that no bonus should be given is unsustainable.

The argument presented on behalf of the Board of Works is one of much greater difficulty and importance. It is extremely inequitable that the bonus should be paid absolutely to the vendor without having the claims of the Board of Works satisfied. The estate of the vendor is solvent as to income; it cannot be brought within the purview of the first sub-s. of s. 48. The Board of Works are the owners of a superior interest. But the bonus is not the purchase-money. There

is a great difference between the purchase-money and the percentage. There is no fiduciary relation between the present owners and the Board of Works. Express language is to be found in s. 3 of the Act of 1904 to induce the owner to sell to the tenants. Under it he is to get the bonus into his own hands, but s. 3 (1) of the Act does not stop there. He is to get the bonus into his own hands, and it is to "be retained by him as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold or the purchase-money thereof, and from any trust affecting the same." I am, with the greatest reluctance, compelled to decide that this "gift from the gods" is not available to pay off the Board of Works charges, but goes into the hands of the vendor for his own use and benefit. This result has been effected by express and direct enactment, the consequence of which is the Board of Works cannot get one penny of this bonus, but it must be paid over to the vendor for his own use and benefit.

Solicitor for the vendor: *Wm. Guest Lane.*

Solicitor for the Treasury: *Wm. M. Lane.*

Solicitor for the Board of Works: *Wm. M. Lane.*

[Affirmed by Court of Appeal, Jan. 28, 1907.]

[*Note up on pp.* 1102 *and* 1160 *of Cherry's Irish Land Acts, 3rd Edition,* 1903–4.]

LAND COMMISSION.

(Before MEREDITH, J.)

In the Matter of the Estate of the REV. WILLIAM RADCLIFFE DOLLING.

LAND COMMISSION.

March, 1906.

Mar. 13, 1906.—*Practice—Life annuity—Redemption of—Restraint on anticipation—Redemption price insufficient to produce income to satisfy annuity—Sale of stock to supply deficiency—Irish Land Act*, 1903, *ss.* 16, 24 (4).

Where, on the sale of an estate under the provisions of the Irish Land Act, 1903, *a life annuity of* £50, *in respect of which the annuitant was restrained from anticipation, had been redeemed, and an application that the restraint on anticipation should be removed, and the redemption price paid to the annuitant had been refused; on a further application, that the money representing the redemption price should be invested, and that such amounts of stock should be sold each half year, as, together with the dividends, would amount to* £25 *:*

Held, *that the annuitant was entitled to receive* £50 *per annum, the full amount of her annuity, and that, under the circumstances, the order asked for should be made.*

Mrs. M. E. R. Staples was entitled to an

annuity for her life of £50, charged upon the estate sold in this matter, and the redemption price having been fixed at £650 that sum was standing to a separate credit. The annuity was subject to the trusts of an indenture of settlement dated Aug. 3, 1883, which contained a clause in restraint of anticipation, and the Court had refused an application for an order removing the restraint upon anticipation, and for payment out to the annuitant of the redemption price, being of opinion that the removal of the restraint would not be for the real benefit of the applicant. The said sum of £650 being insufficient to satisfy, out of the dividends of any stock in which it could be invested, accruing gales of the annuity, a further application was now made that, after payment of the costs of the aforesaid prior application, and of £12 10s., being the amount of the annuity payable for the quarter ending March 7, 1906, the Accountant-General be directed to invest the balance of the said sum of £650 in India 3 per cent. or 3½ per cent. stock, and pay the dividends thereon from time to time to M. E. R. Staples on account of her annuity of £50, and to sell each half-year such amount of said stock as, together with the dividends received, would amount to £25, and pay the proceeds of such sale to M. E. R. Staples.

Jellett, K.C., for the applicant, Mrs. Staples.

MEREDITH, J.—I regret that I was not asked

LAND COMMISSION.

March, 1906.

when ruling the final schedule to deal with this annuity under s. 24 (4). If that sub-section is to be utilised at all in connection with the distribution of purchase-money under the Land Purchase Acts it appears to me that it ought to be utilised in cases such as the present, where, owing to the annuitant being restrained from anticipation, the difficulty which has occurred in this case must necessarily arise. Had that course been taken, I, in accordance with the Act of Parliament, would have been justified in ordering that a capital sum should be set apart, sufficient, when invested in trust securities, to produce an annual income of £50. I do not blame the parties because they did not take this course. The special circumstances, disclosed on the former application, led the annuitant to hope that the restraint on anticipation would be removed, and that, if the annuity was redeemed in the ordinary way, the capital sum would be paid to her. But I desire to draw special attention to s. 24 (4) because it appears to me that the fairest way to deal with an annuity in respect of which the annuitant is restrained from anticipation is under that sub-section. There is an alternative course which I have taken, with the consent of the parties, on more than one occasion, in cases such as the present. Although the annuity has been redeemed, and the redemption price fixed, I have, with the consent of the annuitant and of the trustees, purchased with the redemption price

an annuity secured by a deed settled by myself, under the provisions of which the trusts affecting the annuity are executed by an insurance company, and the annuity paid during the life of the married woman. I see no objection to that course in the future as in the past, provided that the circumstances of the case justify the Court in fixing the redemption price at such a sum as will enable the annuity to be purchased from a company approved of by the Court. In the present case a third method of dealing with the fund is suggested by counsel on behalf of the annuitant, and I am disposed to adopt it for obvious reasons. I am satisfied that I have no power to compel the annuitant to adopt either the first or the second alternative. The first is out of the question, because the funds have been distributed. The redemption price of £650 has been placed to a separate credit, and, so far as the estate is concerned, I cannot go back on what has been done. Then as to the second alternative, I cannot compel the annuitant to purchase a Government or insurance office annuity. The Act of Parliament transfers her claim to the purchase-money. I have the redemption money set apart to meet her claim, and I think it would be contrary to the terms of the settlement under which she derives that the capital sum of £650 should be tied up until the time of her own or her husband's death, and that only the dividends on the invest-

LAND COMMISSION.

March, 1906.

ments representing that capital sum should be paid to her. The result would be that, instead of getting what she is entitled to under the settlement and the Act of Parliament, she would be receiving a much reduced annuity, although, no doubt, she would have the capital to spend after her husband's death, or to dispose of by will in the event of her death in his lifetime. I therefore consider that the principle of *Nicholson's Estate*, Ir. R. 11 Eq. 177, is applicable to the state of facts existing in the present case, and I will make the order prayed for. If the figures before me are correct, I think that I am in effect, securing for this lady, if her life is measured by the ordinary rules, a full annuity of £50. As to the costs, I have some difficulty as to allowing the costs of the unsuccessful application to remove the restraint against anticipation out of the £650, for this obviously involves the removal of the restraint on anticipation to enable her to pay her solicitor, and I do not assent to the proposition that trustees are entitled as of right to payment of costs out of the fund in such a case. However, as the application was *bona fide*, and as the nature of the case and the facts at all events showed that the applicant was anxious to do what she considered right, I think it is best for her that the restraint on anticipation should be removed to this extent so as to relieve her from liability to an action for costs. I accordingly allow eight guineas out of the fund in Court for the

costs of the application to have the restraint on anticipation removed.

Solicitors for Mrs. Staples : *French & French.*

[*Note up on pp.* 1075 *and* 1087 *of Cherry's Irish Land Acts*, 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of ROBERT INNES.

LAND COMMISSION.

Oct., Nov., 1906.

Oct. 30, Nov. 1.—*Land Purchase Acts—Redemption of superior interests—Costs of parties entitled—Sum retained insufficient.*

Where, after allocation and payment out of the residue of the purchase-money of an estate sold under the provisions of the Irish Land Act, 1903, *it appeared that the costs of the owners of two head rents to which the lands sold had been subject exceeded the sums which had been retained in respect thereof :*

Held, *that the vendor should be ordered to lodge in Court a sum sufficient to supply the deficit.*

Hughes' Estate XI. Quarterly Land Reps. 221, *and Hyndman's Estate, June* 7, 1906 (*unreported*), *explained.*

The lands sold in this matter were subject to two head rents, payable to Mr. H. W. Webb and Mr. Dalton, which had been redeemed, and £40 having been retained for costs of showing title to Mr. Webb's head rent and £50 for costs of Mr. Dalton's head rent, the funds in Court were allocated and the residue paid out to the vendor. When the costs of the owners of the

two head rents were afterwards taxed and ascertained, those of Mr. Webb were certified at £85 1s. 4d. and those of Mr. Dalton at £78 5s. 3d., and they now applied for an order that the vendor should refund sufficient money to make up the amount of their costs. It appeared that another sum of £15 retained against a contingent liability for Crown Duty which had not arisen was also available in addition to the aforesaid sums of £40 and £50.

Brunskill for Mr. Webb.

Corvan for Mr. Dalton.

W. G. Gibson for the vendor.

WYLIE, J.—In this case there are two applications—one made on behalf of W. F. Webb and the other on behalf of Mr. Dalton—for an order on the vendor to lodge in Court sufficient money to cover the excess of their taxed costs over the amount retained in each case in respect of costs. I held over my decision merely to confer with the Master of the Rolls regarding two cases—*Hughes' Estate* and *Hyndman's Estate*—in which it was suggested that the judgments were inconsistent. I have seen the Master of the Rolls, and have ascertained that the judgments were not in the slightest degree inconsistent. The first was decided on the question of fact as to whether the person entitled to the costs had bound himself, and it was on that ground that the Master of the Rolls decided that he could not order the vendor to bring back the money.

LAND COMMISSION.

Oct., Nov., 1906.

In the second case he decided that nothing had occurred in the transaction to bind or estop the claimant or his solicitor from claiming the full amount of his costs even if that amount, when certified, exceeded the amount retained, and he therefore made an order on the vendor to lodge a sum sufficient to meet the excess. It seems to me that, in practically all cases, the object of retaining sums to meet the costs of the owners of superior interests is to enable the Court to distribute the funds and pay out the balance to the vendor. That is really logical, for it is quite clear that the vendor is not entitled to be paid unless the costs are paid, and, therefore, the solicitor for the owner of a superior interest, in order to assist payment out, enters into an agreement that a certain sum which he measures, and which would probably be sufficient for costs, should be retained, and that the residue should be paid out to the vendor. In most cases that is the only effect of the arrangement. It appears to me to have been the only arrangement in the two cases before me. There is some dispute as to what actually took place, but it appears from the facts, as stated in Mr. Dudley's affidavit, and particularly having regard to the fact that after the costs had been taxed and found to exceed the sums retained, Messrs. O'Connor & Dudley wrote a letter stating that the £15 in Court would be available, that they did not consider the sums retained to be the maximum sums payable to the claimants. I think an

order similar to that made in *Hyndman's Estate* should be made in this case, and that the vendor should be ordered to lodge such sum as will be sufficient with the two sums retained in respect of costs, together with the £15, to pay the taxed and certified costs of the claimants.

Solicitors for vendor: *O'Connor & Dudley.*

Solicitor for Webb: *John Lanigan.*

Solicitors for Dalton: *Collis & Ward.*

[*Note up on p.* 384 *of Cherry's Irish Land Acts*, 3*rd Edition*, 1903.]

LAND COMMISSION.

(Before MEREDITH, J.)

In the Matter of the Estate of the EARL OF BANDON.

LAND COMMISSION.

June, 1906.

June 28, 1906.—*Land Purchase—Reservation of mineral rights to Land Commission—Powers of Land Commission in respect thereof—Irish Land Act*, 1903, *s.* 13 (3).

The Land Commission have no power to deal with the exclusive right of mining and taking minerals, and of digging and searching for minerals, reserved to them under the provisions of s. 13 (1) *of the Irish Land Act*, 1903, *and cannot let, lease, sell, or demise such rights until they have been authorised to do so by Act of Parliament.*

Question submitted by the Estates Commissioners for the decision of the Judicial Commissioner. The vendor had lodged an originating application and agreements for the sale of his estate in the county of Cork direct to the tenants under the provisions of the Irish Land Act, 1903, and interest in lieu of rent was being collected by the Land Commission, but the advances applied for had not yet been sanctioned. The agreements for sale contained a clause reserving the exclusive right of mining and

taking minerals, and of digging and searching for minerals, to the Land Commission. An application having been made to the Land Commission for a prospecting licence for twelve months, with an option of taking a mining lease for sixty years of certain of the lands, the following question was submitted for the decision of the Judicial Commissioner :—Having regard to the provisions of the 13th section of the Irish Land Act, 1903, are the Irish Land Commission empowered to grant a prospecting licence or otherwise to deal with or dispose of the said mineral rights, or have they no such power until it has been provided by Parliament in what way the said rights are to be disposed of ?

Solicitor-General and *Dudley White* for the Treasury.

Conner, K.C., for the vendor.

MEREDITH, J.—The Act of 1903, in my opinion, prohibits the Land Commission from interfering in any way, with the mines and minerals vested in them until Parliament authorised them to do so by another Act, which, as it seems to me, need only be an Act to regulate the mode in which the Land Commission are to exercise the rights conferred upon them by s. 13 of the Act of 1903. In point of fact, the whole section must be read together, as fettering the hands of the Land Commission until regulations are made by Parliament to carry out the principle very clearly indicated in the section :—viz.,

LAND COMMISSION.

June, 1906.

the disposition by the Land Commission of their rights in respect of mines and minerals. It seems to me to be perfectly clear, from the second proviso to sub-s. 3, that Parliament has laid down definitely and distinctly the lines that are to be followed :—" Provided also, that where any such right reserved to the Land Commission under this sub-section is at any time hereafter let, leased, sold, or demised by them, the vendor (or the person who would have been entitled thereto if the lands had not been sold) shall be entitled to receive twenty-five per cent. of any rent, purchase-money, or other net profit received by the Land Commission in respect of same, unless the Land Commission shall have purchased from the person entitled to such percentage his interest therein, and the Land Commission may purchase such interest at any time on such terms as may be sanctioned by the Treasury." In this proviso, it appears to me, Parliament has indicated in the clearest terms to vendors, who are bound by the provisions of s. 13, that the manner in which mines and minerals vested in the Land Commission are ultimately to be dealt with is to be by way of letting, leasing, sale, or demise by the Land Commission, who will be bound to account for the net profit on each and every transaction in such a way as to give the vendor, or other person entitled thereto, twenty-five per cent. of any rent, purchase-money, or other net profit received by them. It would have

been possible, by the addition of a very few words to the section, not merely to have indicated the lines, but to have given power to the Land Commission to take steps to dispose of the rights on the lines indicated. But there are no such enabling words, and I adopt Mr. Conner's argument on the point. It is impossible to ignore the words in sub-s. 3, "and the said right shall be disposed of by the Commission in the manner hereafter to be provided by Parliament." The "said right" is the exclusive right of mining and taking minerals, and digging and searching for minerals on or under the land—*i.e.*, the very rights which the Land Commission take under the section. I see no difficulty in reading the section as one consistent whole. What the Land Commission need is an Act of Parliament which will authorise them to deal with these rights—authorise them to let, authorise them to lease, authorise them to sell, and authorise them to demise—an Act which will, in fact, authorise the Land Commission to start the machinery which will make the mines and minerals vested in them a profitable undertaking. Until such an Act is obtained, in my opinion, they cannot stir. I answer the question that has been submitted to me by saying that in my judgment the Land Commission have no such power. With regard to the question suggested by the solicitor for the Treasury, I did not understand Mr. Conner to claim that Lord

LAND COMMISSION.

June, 1906.

Bandon has, *pendente lite*—so to speak—the right of mining and taking minerals. I understood him to say that, as the sale has not actually been completed, the Land Commission can take no steps, whether authorised by Parliament or not, for the simple reason that, if the sale were to fall through, all the provisions with regard to mines and minerals would become inoperative. I entirely agree with that view, because, until the vesting order is made, and the mines and minerals are vested in the Land Commission, they can take no steps. The question of any attempt by a vendor to interfere with the mines or minerals, while a proceeding for sale is pending, is one that may possibly come before me on some future occasion. It does not arise now; but I will say this, that if the sale is completed, beyond all doubt the sale relates back to the original agreements, and if, in the meanwhile, the mines or minerals are tampered with, it occurs to me that it will be a serious matter for any person concerned in tampering with them.

Solicitor for the Treasury: *Wm. Lane.*

Solicitor for the vendor: *Clifford Lloyd.*

[*Note up on p.* 1070 *of Cherry's and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before MEREDITH, J.)

In the Matter of the Estate of SIR JAMES HENRY STRONGE, BART.

LAND COMMISSION.

June, July, 1906.

June 26, July 10, 1906.—*Land Purchase Acts—Apportionment of superior rent—Redemption of part apportioned on lands sold—Security—Personal covenant for payment of rent—Irish Land Act*, 1903.

In fixing the redemption price of an apportioned part of a head rent, the Court will treat it as a separate rent issuing out of the particular lands upon which it has been apportioned, and in estimating the security will have regard to the difference between the amount of the apportioned part to be redeemed and the annual rental of those particular lands.

A personal covenant to pay the rent is an element to be taken into consideration in fixing the redemption price.

Application for an order fixing the redemption price of £188 10s. per annum, and £150 2s. 7d. per annum, being apportioned parts of the rents reserved by the grants in perpetuity hereafter mentioned, fixed by orders of the Court on lands comprised in the estate sold. By grant in per-

LAND COMMISSION.

June, July, 1906.

petuity dated April 30, 1856, and made between the Provost, Fellows and Scholars of Trinity College, Dublin, and Sir James Matthew Stronge, Bart., in pursuance of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851, certain lands (including portion of the lands sold in this matter, hereafter referred to as the College Hall portion) were granted to the said Sir James Matthew Stronge, his heirs and assigns for ever, subject to the yearly rent of £591 6s. 1d., over and above all taxes (save as therein excepted), or subject to such increased, diminished or revised yearly rent or sum as might from time to time thereafter be substituted in the place of the said rent under the provisions of the said Act of Parliament, payable as therein provided. The said rent was subsequently fixed at £701 8s. 10d. By another grant in perpetuity also dated April 30, 1856, and made between the same parties, certain other lands (including another portion of the lands sold in this matter, hereafter referred to as Fellows' Hall) were granted to the said Sir James Matthew Stronge, subject to a variable rent of £610 1s. 5½d. which rent was subsequently fixed at £722 8s. 11d. Both the said grants were made subject to reservations of mines, minerals, and timber, and contained covenants by the grantee to pay the rents thereby reserved, or such rents as might from time to time or at any time thereafter be substituted therefor. The vendor, who was tenant-for-life under the trusts of a marriage

settlement dated Oct. 5, 1885, had sold portion of the lands comprised in the said grants under the provisions of the Irish Land Act, 1903, and said rents had been apportioned, £188 10s., part of the rent of £701 8s. 10d., being fixed on the College Hall portion of the estate sold, and £150 2s. 7d., part of the rent of £722 8s. 11d., being fixed on the Fellows' Hall portion of the estate.

Brown, K.C., and *Calvert* for the vendor.

Jellett, K.C., for Trinity College.

MEREDITH, J.—I do not know any more difficult task than that of fixing the redemption price of rent-charges redeemable under the Irish Land Act, 1903, or the previous Land Purchase Acts. In this case the sale took place prior to 1903, and, consequently, is not complicated by any question with regard to the bonus. Why the case has not come before me until July, 1906, I do not know, but neither party suggested that the delay in fixing the redemption price made any material difference. I do not find that familiarity makes the work of fixing redemption prices more easy, as I endeavour to carry out the principles laid down by the Court of Appeal, applying my mind to the special considerations before me, and to decide on the particular facts of each individual case. In this case a question arises which has not been made the subject of direct decision up to the present. I have considered the matter on former occasions, but I

LAND COMMISSION.

June, July, 1906.

do not remember actually laying down, in express terms, in any previous case, the principle which lies at the root of the judgment which I am about to pronounce. I hold that, for the purpose of fixing the redemption prices of the two sums mentioned in the notice of motion—viz., the apportioned rents of £188 10s. and £150 2s. 7d.—I am bound to have regard only to the property upon which those apportioned rents were charged, and to fix the prices accordingly. I must take it that the apportionment was made according to law, no one has quarrelled with it, and the result of that apportionment is this—that the argument with regard to the narrow margin between the total rental and the entire rent-charges, so far as these two sums are concerned, is swept away by the figures. What may be the result when the residue comes to be redeemed I do not know, it is not for me to prophesy. It may be that the parties have placed too small a sum on the lands sold in this case. What has been done must remain, and, in my opinion, when the reasons for the apportionment are considered, and the object of the statute is borne in mind, it is perfectly right that the Court should concentrate its attention only on the particular lands that have been sold and on the portion of the rent that has been apportioned on them. The vendor has chosen to sell only part of his estate, and in order to enable him to do so (it being out of the question, as I assume, to redeem the entire head rents) he

applied to the Court to apportion on that part of his estate portion of the rents payable to Trinity College. The rent payable to Trinity College out of the College Hall portion of the lands sold, as fixed by my order, is £188 10s., the rental of the lands in first term, second term, and new tenancies created for the purpose of the sale is £278 6s. 4d., and the purchase-money is £5,423. On these figures I am prepared to act. I should say, with reference to the rents generally on the *Stronge Estate*, that I can conceive no stronger testimony to the fairness of the rents and the punctuality of the tenants' payments, than the statement in Sir James Stronge's affidavit that the average annual loss arising from rents irrecoverable out of the lands amounts to only £7 10s. I have before me the rental, I have the purchase-money, and the College Grant. I bear in mind everything said in *Close's Estate*, X Quarterly Land Reps. 200, 39 Ir. L. T. R. 26, and the principles laid down by the Court of Appeal. With reference to my decision in *Dunraven's Estate*, XI. Quarterly Land Reps. 211, 40 Ir. L. T. R. & S. J. 234, as to the personal covenant by the grantee for payment of rent, there were special circumstances in that case with reference to the covenant by the grantee, who was the vendor's immediate predecessor in title, but I know the difficulty of following assets in ordinary cases. I have no evidence of the existence of assets which would be available in this case, and, while

LAND COMMISSION.

June, July, 1906.

I have taken the matter into consideration, I do not put any more value on the rent by reason of the existence of the covenant. I see no reason why I should place a lower value on the rents in this case than that fixed in *Close's Estate*. On the figures I fix the redemption price of the £188 10s., charged on the College Hall portion of the estate at £4,620. With regard to the Fellows' Hall portion of the estate the figures are on the same lines precisely, an apportioned rent of £150 2s. 7d., charged on £214 14s. 4d., and the purchase-money amounting to £4,182, so that the principle is identical. I fix the redemption price at £3,680.

Solicitor for the vendor: *H. J. Harris.*

Solicitors for Trinity College: *Maunsell & Darley.*

[*Note up on p.* 420 *of Cherry's Irish Land Acts*, 1903.]

LAND COMMISSION.

(Before MEREDITH, J.)

In the Matter of the Estate of ABRAHAM J. HOWLIN.

LAND COMMISSION.

March, July, 1906.

March 23, July 27, 1906.—*Land Purchase—Allocation—Mortgage debt—Arrears of interest—Statute of Limitations—Irish Land Act,* 1903, *ss.* 16, 24.

Where lands are sold under the provisions of the Irish Land Act, 1903, *mortgagees are not entitled to more than six years' arrears of interest, calculated to the date of the payment of the purchase-money into the Bank of Ireland, and of the order attaching claims thereto, together with interest accrued after that date. Lloyd* v. *Lloyd,* [1903] 1 Ch. 385, *does not apply to proceedings under the Land Purchase Code.*

Question arising on ruling of the final schedule. The vendor was entitled absolutely to one moiety of the estate sold, and was tenant-for-life of the other moiety. Among the incumbrances appearing on the schedule as affecting his interest was a mortgage made in 1874 by the vendor to James Howlin and C. Townsend to secure sums of £900 and £250 with interest, and the vendor's interest in the purchase-money and bonus was insufficient to discharge the principal sums due

LAND COMMISSION.

March, July, 1906.

under this mortgage. By an indenture dated Sept. 27, 1883, James Howlin sub-mortgaged his interest to Frederick Brewster to secure £200 and interest, and, subsequently, in 1902, again sub-mortgaged to William S. Hayes and J. H. North. No payment of interest on the sub-mortgage for £200 had been made since 1884, and Mr. Brewster now claimed to be entitled to payment of all arrears of interest in addition to the principal. A question also arose as to the date to which arrears of interest should be culculated.

Jellett, K.C., for vendor.

Robert Doyle for Mr. Townsend.

J. E. Walsh for Mr. Brewster.

M'Gusty for Messrs. Hayes & North.

Authorities cited:—*Lloyd* v. *Lloyd*, [1903] 1 Ch. 385; *Re Stead's Mortgaged Estates*, 2 Ch. D. 713; *Owen Lewis' Estate*, [1903] 1 Ir. R. 348; *Re Slater's Trusts*, 11 Ch. D. 227.

MEREDITH, J.—I have had considerable difficulty in dealing with this question raised by counsel on behalf of Mr. Brewster. I confess that the case of *Lloyd* v. *Lloyd*, relied on by Mr. Walsh, which was a decision of the Court of Appeal in England overruling *Re Slater's Trusts*, came, to a certain extent, as a surprise, as no attempt has ever been made to apply that decision to proceedings under the Land Purchase Acts, although the case was brought before

Ross, J., in relation to Land Judge's Court proceedings in *Owen Lewis' Estate*, to which I shall presently refer. Of course, if the decision of the Court of Appeal in England was applicable, either on the facts or on principle, to the present case, I would have no option but to follow it, but it must be remembered that the Code under the Land Purchase Acts is peculiar, and that decisions which are applicable to ordinary actions and suits do not necessarily apply to the special provisions of the Irish Land Acts. Now, in *Lloyd* v. *Lloyd* a mortgagor applied by summons against a mortgagee that the fund in court, being the proceeds of the mortgaged property, might be paid out to him, and challenged the right of the mortgagee to more than six years' arrears of interest in addition to the principal. The decision was that the mortgagor had placed himself in the position of a plaintiff in a suit for redemption, and was bound to pay the full arrears of interest. *Re Stead's Mortgaged Estates* and *Re Slater's Trusts* were there mentioned, and *Re Slater's Trusts* was definitely overruled, but the ground of the decision of the Court of Appeal—a decision which undoubtedly remains binding on me—was that the proceedings were analagous to a redemption suit, and as a mortgagor in a redemption suit is not permitted by a Court of Equity to redeem without paying the full amount of arrears, so in that case he should not be permitted to draw the money out of court without paying to the mortgagee all

LAND COMMISSION.

March, July, 1906.

arrears, no matter how many years were due. Well, Ross, J., dealt with that case in *Owen Lewis' Estate.* [Reads head note and part of judgment.] Mr. Walsh contends that the decision of Ross, J., is only a decision in an incumbrancer and petitioner matter, and would not apply in the case of an owner and petitioner matter, and, no doubt, it was in the argument in that case suggested that there might be a difference between an owner and petitioner matter and a petition by an incumbrancer. I felt some difficulty about that, but for my part I think it better that I should follow the law as it has been followed for years in this country than, as a judge of first instance, decide that in a Landed Estate Court matter, instituted by an owner, *Lloyd* v. *Lloyd* would apply, and that Land Purchase Act proceedings would fall under the same ban. *Nixon's Estate,* Ir. R. 9 Eq. 7, in the Land Judge's Court has a bearing on the very point. In that case there was a claim by a legatee for a legacy upon which a great number of years arrears of interest were due. The decision of the Court of Appeal is familiar to Irish lawyers. I only call attention to the point that the question as to what amount of interest should be allowed was left to the Court below. I have ascertained from the Registrar that Flanagan, J., only allowed interest from six years previous to the date of the filing of the petition. *Nixon's Estate* was discussed in *Bateson's Estate,* 29 Ir. L. T. R. 90, in which it

was contended before Bewley, J., and subsequently before the Court of Appeal, [1896] 2 Ir. R. 171, that an originating application or order for advance under the old practice was sufficient to stop the Statute of Limitations from running. Bewley, J., held that it did not, and in a most interesting and masterly judgment he discussed the origin and traced the history of Land Purchase proceedings from the beginning, and decided, so far as sales were carried out by conveyance under the old system, that the Land Commission were merely in the position of the Board of Works, and had no judicial functions. It was thrown out, indeed, that even in the case of sales by vesting order it was doubtful whether the Landed Estates Court decisions would apply, but when the case came before the Court of Appeal ([1896] 2 Ir. R. 175) the Court of Appeal, while affirming the result of the decision of Mr. Justice Bewley, reserved their decision on the point as to whether *Colclough's Estate*, 8 Ir. Ch. R. 330, and *Nixon's Estate* would apply to a sale carried out by vesting order. Now, of course, in all cases under the Act of 1903—and this is a case under the Act of 1903—the sales are carried out by vesting order only, and the position is therefore entirely different from that in *Bateson's Estate*. However, while the Court of Appeal left over for further consideration the case of a sale by vesting order, the point came up for decision before Bewley, J., in *Smithwick's Estate*, [1896] 2 Ir. R. 401. [Reads headnote.] That case

LAND COMMISSION.

March, July, 1906.

was not cited to me, but it is a precise and absolute decision on the identical point in question. Bewley, J., declared that the incumbrancers were entitled to the principal sums due with arrears of interest for six years next preceding the making of the vesting order, and by virtue of s. 9 (5) of the Act of 1885 their claims were transferred to the purchase-money. Now, under the Act of 1903, the effect of an order vesting lands in the Land Commission is as stated in s. 16. [Reads.] Then follows s. 24. [Reads.] It appears to me that if I were to decide in favour of Mr. Walsh's contention I would be overruling the decisions of both Flanagan, J., and Bewley, J., one of them pronounced as far back as 1886, and I should not do that unless it was clearly demonstrated that the decision of the Court of Appeal in England in *Lloyd* v. *Lloyd* applied to the special and peculiar Land Purchase Code and to the special and peculiar provisions under which the distribution of purchase-money takes place in this Court. Having regard to the provisions of s. 24 I need not go back to the Acts of 1885, 1887, and 1891, but taking that section alone it seems to me to be plain that *Lloyd* v. *Lloyd* has no application whatsoever, and that the proceedings in this Court could not be held to resemble a redemption suit by the vendor or by an incumbrancer claiming priority or being puisne to Mr. Walsh's client. There is no analogy, in my opinion, of any sort or description ; it is not a case of Mr. Howlin claiming to

pay off Mr. Brewster by paying the principal with six years' arrears of interest. It is a special and peculiar case in which, for the great purposes of the Land Purchase Acts, Parliament has authorised the conversion of estates in Ireland into money. The purchase-money is to be paid into court, there is no plaintiff or defendant in a suit, and the Court under the sections to which I have referred has to ascertain the claims affecting the purchase-money to distribute it. If there is any plaintiff in the particular case before me it is the person alleging his right to be paid out of the proceeds of sale. I only make one further remark in regard to *Lloyd* v. *Lloyd*, and that is, that whether the Court of Appeal considered that the decision in *Re Stead's Mortgaged Estates* was right or otherwise they did not overrule it as they did the decision in *Re Slater's Trusts*. I hold that *Lloyd* v. *Lloyd* has no application to proceedings under the Irish Land Code, and that I ought to follow the decision of Bewley, J., in *Smithwick's Estate* with this qualification. At that time there was no s. 24, and the date fixed by Bewley, J., was that of the making of the vesting orders. Here I apprehend that since the Act of 1903 the correct date on which the operation of the statute of Limitations is to cease is the date of the payment of the purchase-money into the Bank of Ireland, and of the order attaching claims to the purchase-money. Practically, the dates are identical, but in order to be

LAND COMMISSION.

March, July, 1906.

absolutely accurate my order will be that Mr. Brewster is only entitled to be paid arrears of interest to the extent of six years, calculated up to the date of the payment of the purchase-money into the bank, and of the order attaching claims to the purchase-money, together with all further interest accrued since that date.

Solicitors having carriage: *Moore, Keily & Lloyd.*

Solicitor for Mr. Townsend: *Gifford & Son.*

Solicitors for Mr. Brewster: *Little & Elgee.*

Solicitor for Messrs. North & Hayes: *Hayes & Son.*

[*Note up on pp.* 1076 *and* 1097 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of JOHN BYERS GUNNING MOORE.

Nov. 8, 1906.—*Land Purchase Acts—Terminable fixed annual payments in lieu of tithe rent-charge—Redemption of—Payments made by vendor—Claim for recoupment out of purchase-money of sum representing capital paid off.*

Where a vendor, who was limited owner of lands sold under the Irish Land Act, 1903, *claimed to be entitled to be recouped out of the purchase-money for payments on account of capital made by him in respect of a terminable fixed annual instalment charged upon the lands by a merging order under the Irish Church Act,* 1869, *Amendment Act,* 1872, *redeeming a tithe rent-charge payable out of the said lands :*

Held, *that the vendor was not entitled to be recouped for such payments.*

Question arising on the ruling of the final schedule in this matter The estate had been sold under the provisions of the Irish Land Act, 1903. The vendor was tenant-for-life of one moiety, and, as to the other moiety, was owner in fee, with an executory limitation over. By a merging order dated April 21, 1879, and made pursuant to the provisions of the Irish Church Act, 1869, Amendment Act, 1872, a tithe rent-charge, pay-

LAND COMMISSION.

Nov., 1906.

able out of the lands comprised in the estate, was merged, and, the purchase price being made payable by instalments, the lands were charged as from May 1, 1878, for the term of fifty-two years, with an annual sum, ascertained in accordance with the said Act. It was proposed to redeem the further payments of the annual instalments. The vendor now claimed to be entitled to be paid out of the purchase-money a sum equal to such proportionate part of the total payments made by him in respect of the instalments since the date of the merging order as would represent payments on account of capital.

Meredith, K.C., and *Osborne* for the vendor.

Jellett, K.C., for the trustees for the remaindermen.

WYLIE, J.—In this case the vendor, who was tenant-for-life of one moiety of the estate sold and owner in fee, with an executory limitation over, of the other, has filed an objection to his own schedule claiming to be entitled to a charge of £722 16s. against the purchase-money in respect of certain portions of capital paid off by him as tenant-for-life, being payments of a fixed annual instalment in lieu of tithe rent-charge put on the estate in 1878. Now, the facts are clear and undisputed. It appears that in 1878 the vendor, as tenant-for-life of one moiety, and James Moore, as absolute owner of the other moiety, applied under the Irish Church Act, 1869, Amendment Act, 1872, to redeem the tithe rent-

charge then affecting the lands in perpetuity, and accordingly the redemption was carried out under s. 7 of that Act at twenty-two and a half times the amount of the tithe rent-charge, less the average amount which, for the previous five years, the owners had been entitled to deduct for poor rates from the tithe rent-charge. The amount of the tithe rent-charge was £81 5s., and the average poor rate was £2 12s. 8d., leaving the net tithe rent-charge £78 12s. 4d. affecting the lands in perpetuity, and the effect of the transaction carried out by the vendor and James Moore was to merge and extinguish the tithe rent-charge entirely. It was then open to the tenant-for-life either to pay twenty-two and a half times the amount of that net tithe rent-charge or to take the benefit of the succeeding part of the section, which enables him to pay by fifty-two annual instalments, calculated at the rate of £4 9s. per cent. on the purchase price. Accordingly, by order dated April 21, 1879, the lands were charged with a fixed annual instalment for fifty-two years. That was exactly 2s. per annum more than the previous payments in respect of tithe rent-charge, and during twenty-eight years the vendor has paid £2 16s. over and above what he would have paid as tithe rent-charge if the tithe rent-charge had not been redeemed. He now asks to be allowed, out of the purchase-money, £722 16s., claiming that that sum is owing to him in respect of capital which he has paid away and released the estate

LAND COMMISSION.

Nov. 1906.

from. Now, as to one moiety, the vendor was tenant-for-life when this charge was put on, and, as to the other, was entitled to a reversionary interest in fee under the will of James Moore, his uncle. When he succeeded to the second moiety the lands were already subject to the fixed annual instalment, and he, as tenant-for-life, was bound in law to pay that annual instalment during his life. So therefore, as regards this moiety, I cannot conceive on what ground he can claim to be recouped for payments of a charge on the lands which he was legally bound to make. Now, is there any difference in the case of the other moiety, where he, as tenant-for-life, himself redeemed the tithe rent-charge? It seems to me that his true position was this. It was optional for him to redeem or not to redeem. He did redeem, but did so under circumstances which put upon him, as tenant-for-life, a legal obligation to pay the fixed annual instalment during his life. All he has done is to discharge that legal obligation which he took upon himself in 1879, and I can see no ground of equity on which he would be entitled to be recouped because he has discharged his legal liability under the statute. I therefore disallow the objection.

Solicitor for the vendor: *William J. Venables.*

Solicitors for the trustees for the remainder-men: *R. Simmons & Co.*

[*Note up on p.* 1133 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before MR. COMMISSIONER WRENCH, MR. COMMISSIONER FINUCANE, and MR. COMMISSIONER BAILEY.)

SHAFTESBURY'S ESTATE.

LAND COMMISSION.

Dec., 1906.

Dec. 13, 14, 1906.—*Land purchase—"Separate estate"—Discretion as to declaration of—Holdings excluded from sale—Resumption by landlord—Building lots—Purchase price—Zones—Payment of bonus.*

A landlord agreed with the tenants on a distinct portion of his estate to sell at a price which would give the tenants a reduction on the average of 15 *per cent. off their rents. Another portion of his estate was let to twenty-eight tenants. He first offered to sell to them at a* 10 *per cent. reduction, which they refused, and he finally offered to sell to twenty-two of them at a* 15 *per cent. reduction. He declined to sell to four of them on the ground that he intended to resume possession of their holdings for building lots, and he offered to sell to the remaining two at prices which would have given them reductions of* 10 *per cent. and* 12½ *per cent. respectively off their rents. The tenants on the latter portion of the estate applied that the Estates Commissioners should not declare any portion of the lands to be a 'separate estate":*

LAND COMMISSION.

Dec., 1906.

Held, *that the four holdings which the landlord wished to resume should be provisionally excluded from the "separate estate" as defined by the Estates Commissioners, on the condition that the landlord undertook to institute proceedings, within twelve months, for the resumption of one of them, as a test case, and that if he failed in those proceedings he would sell those four holdings to the tenants as a "separate estate" on the terms on which he had agreed to sell other second-term holdings on the same portion of the estate.*

Quære: *In the exercise of their discretion in the declaration of "separate estates" are the Estates Commissioners entitled to take into consideration the prices which the tenants have agreed to give, and to refuse to define lands as a "separate estate" in a case where it may be reasonable to assume that the vendor would have a sufficient inducement to sell at the prices which the tenants are willing to give without the aid of the bonus?*

Application on notice by a number of tenants on the Greenisland and Woodburn districts of the estate of the Earl of Shaftesbury for an order that the application of the said Earl that the other portions of the lands which he proposed to sell to the tenants thereon, and which were situate in the same county, should be declared a "separate estate" to the exclusion of the lands in the occupation of the applicants, might be refused. The facts are stated at length in the judgment.

T. M. Healy, K.C., M.P., and *W. J. Johnston* for the applicants.

R. F. Harrison, K.C., and *D. M. Wilson* for the Earl of Shaftesbury.

J. Donaldson for the tenants who had agreed to purchase.

MR. COMMISSIONER FINUCANE.—The judgment which I am about to deliver has been read and agreed to by Mr. Commissioner Bailey. It is to be understood that when the word "we" is used I am speaking only for Mr. Bailey and myself. In this case the vendor has applied to have certain lands declared by the Estates Commissioners fit to be regarded as two separate "estates" for the purposes of the Irish Land Act, 1903, under s. 98 (1) of that Act. The land, which it is proposed to have so declared, comprises 130 holdings, situate in the county of Antrim, and some of them in the immediate neighbourhood of Carrickfergus. The occupiers of holdings on these estates have agreed to purchase them at prices, the annuities on which, payable to the Land Commission for sixty-eight and a half years, would, on the average, be 15.5 per cent. less than their present rents; in other words, an average of twenty-six years' purchase of the rents. One hundred and eleven of these holdings are held at judicial rents, fixed since the year 1896, which the tenants have agreed to purchase at 26.3 years' purchase. Five are also held at judicial rents

LAND COMMISSION.

Dec., 1906.

fixed since 1896, which the tenants have agreed to purchase at 27.7 years' purchase. Three are held at judicial rents fixed before the year 1896, which the tenants have agreed to purchase at 22.2 years' purchase. Two are held at judicial rents fixed before 1896, which the tenants have agreed to purchase at 26.1 years' purchase. Nine are held at non-judicial rents which the tenants have agreed to purchase at 23.4 years' purchase. The total average all round is 26 years' purchase, representing annuities at 15.5 per cent. less than the existing rents. There are, however, in the immediate neighbourhood of Carrickfergus, some 28 holdings owned by the vendor, the occupiers of which have not agreed to purchase, and which the vendor at first proposed to exclude from the property to be sold on the ground that they are more valuable than other holdings comprised in the property, and that the tenants should give higher prices for them—viz., 27¾ years' purchase of the existing rents, which prices would make the purchasers' annuities 10 per cent. less than their existing rents, and that the tenants were unwilling to give these higher prices. We heard counsel on behalf of the vendor and tenants in May last. The question then before us was whether, on the grounds stated above, we should permit these holdings to be excluded from the sale, and whether we should declare the remaining holdings proposed to be sold an "estate" for the purposes of Part I. of the Act of 1903. We

then arranged to have an inspection made of the holdings proposed to be excluded with a view to ascertaining whether they have a special enhanced value owing to their suitability for building purposes, so as, if so, to enable us to decide whether we should agree to their exclusion. The Inspector's report has lately been received, and copies of it have been furnished to the owner and to the solicitor for the tenants concerned. According to the Inspector's view only two of the holdings proposed to be excluded have such special enhanced value as furnishing suitable sites for building villas thereon, these two holdings being in the occupation of Mrs. J. E. Johnstone and Mr. Magee. Lord Shaftesbury's counsel now proposes that only these two holdings and two others in addition—viz., those of Catherwood and Herdman, should be excluded on the ground that he has a legal right to resume them for building purposes, and that he intends to exercise that right. The question which we have now to hear and determine has, therefore, narrowed itself down to this, should we allow these four holdings to be excluded from the sale on the grounds above mentioned. We think that there is some force in the vendor's contention in this respect, and that, if he has in fact a legal right to resume these holdings, he should not be deprived of that right and be compelled to sell them, or, in default of his doing so, be deprived of the power of selling the remaining holdings as an "estate." But, while holding

LAND COMMISSION.

Dec., 1906.

this view, we are also of opinion that the occupants of these holdings should not be kept in a state of suspense for an indefinite period. We therefore agree to the exclusion, at present, of these four holdings on the condition that the vendor undertakes to institute proceedings within twelve months from this date for the resumption of the whole of one of the holdings which he proposes to exclude, or at least of that part which he proposes to exclude, say that of either Catherwood or Herdman, which the vendor alleges to be in the same condition for this purpose as the holdings of Mrs. Johnstone and Magee (which the Inspector has reported form sites on which villas might be built), and also on the condition that, if these proceedings fail, the vendor will sell these four holdings as a "separate estate" on the terms on which he has agreed to sell other holdings subject to a second term rent on the Greenisland property. If these conditions are not complied with we regret that we cannot see our way to the exclusion of these holdings, all of which it may be observed are held under judicial rents fixed by the Land Commission. But a broader question arises in this case, which is stated further on. The total purchase-money which the tenants have agreed to pay represents 26 years' purchase of the existing rents. This sum invested at 3½ per cent. would yield 91 per cent. of the gross rental of the estate, and, with the bonus, 101.9 per cent. of the gross rental. Invested

at 3¾ per cent., with the bonus, it would yield 109 per cent. of the gross rental, and at 4 per cent., 116 per cent. of the gross rental. The Judicial Commissioner has decided in the case of the *King-Harman Estate* that, if the Estates Commissioners finally declare any lands to be an estate the bonus must be paid on the purchase-money, save where the estate comes within the exceptions mentioned in s. 48 of the Act, under which exceptions this estate does not fall. The question of bonus or no bonus, therefore, entirely depends on the decision of the Estates Commissioners to declare or refuse to declare any particular land to be an "estate." The Estates Commissioners are, therefore, custodians of the public funds in this respect, and the responsibility is laid upon them of refusing to give the bonus in cases where it should not be given. Now, s. 48 of the Act recites that the bonus is given for the purpose of aiding the sale of estates under this Act, and the question arises—is it necessary or desirable to give the bonus in a case in which the purchase-money is so high that it may be reasonable to assume that the vendor would have a sufficient inducement to sell at the prices the tenants are willing to give without the aid of the bonus? On this point we do not desire to offer any opinion at present, but we think that the Treasury should be informed of the facts of the case before we finally declare these lands an "estate," and asked, if they think fit, to appear before us by

LAND COMMISSION.

Dec., 1906.

counsel, and argue the question whether in cases of this description the lands should finally be declared an "estate" for the purposes of the Act, thus necessitating, if so declared, the payment of the bonus, no matter how high the purchase prices may be, so long as they fall within the zones, or whether, on the other hand, we should refuse to declare the lands in such cases to be an "estate" and let the parties buy and sell respectively under the previous Acts. Meanwhile, the lands known as the Antrim Estate may be provisionally declared a "separate estate" for purposes of the Act so as not to retard inspection and other proceedings, and the lands known as the Carrickfergus Estate may also be provisionally declared a "separate estate" on compliance by the vendor with the conditions above named.

MR. COMMISSIONER WRENCH.—I agree in the first part of my colleagues' judgment in so far as they decide to limit the estate by omitting the holdings therein referred to, putting the landlord on terms to test any right of resumption which he may have, within a limited time. As to the second statement made, which my colleagues describe as the broader question—namely, that we have jurisdiction to refuse to declare the lands an estate under s. 98 of the Act, on the ground that having regard to the prices at which the landlord has agreed to sell, and the tenants have agreed to buy, in this direct sale case, if the

bonus is taken into account, the total sum payable to the landlord, if invested at 3½ per cent., would, it is alleged, yield more than the gross rental—my view is, that if the sales are within the zones and the terms of the Act, the Estates Commissioners have no such jurisdiction. I consider the question as to whether a bonus is payable or not should be decided judicially, and that the question of what the landlord's income may be if invested in a certain manner, is not one which, under the Act, we have any right to make a basis for our refusal to declare the estate. Further, I do not think that we have any right to refuse to declare such lands an estate merely on the ground that the tenants have agreed to purchase at what appears to be a large price as compared with the prices on other estates. And I dispute that where we follow zone prices as laid down by the legislature for our guidance we can in any way be called to account for having neglected our duties as custodians of the public purse. I do not agree that this matter is a fit subject for argument by the Treasury before us in the manner suggested, but consider that if my colleagues entertain the doubts expressed by them the proper course is to submit them as a question of law under s. 23 of the Act for the decision of the Judicial Commissioner, when the Treasury can appear if so advised.

MR. COMMISSIONER FINUCANE—I should like

LAND COMMISSION.

Dec., 1906.

to state merely that neither I, myself, nor Mr. Bailey have, in this judgment, expressed any opinion as to whether we have a jurisdiction to refuse to declare any property to be an "estate" on the grounds stated. What we propose is that the Treasury should be asked to come in and argue the question before us, and then we will come to a conclusion for ourselves, or refer it to the Judicial Commissioner, as the case may be; but I wish to guard against its being supposed that either Mr. Bailey or myself have, on the present motion, expressed any opinion on this point.

Solicitors for the applicants: *Moorehead & Wood.*

Solicitors for the vendor: *Torrens & Bristow.*

Solicitor for the tenants who had sold: *M'Ninch.*

[*Note up on p.* 1051 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

IRISH LAND REPORTS.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, L.C., FITZGIBBON and HOLMES, L.JJ.)

MADDEN'S ESTATE.

APPEAL.

Jan., 1907.

Jan. 18, 21, 1907.—*Land Purchase Acts—Land Judge—Inadequacy of offer by Land Commission to Land Judge—Sale by public auction—One lot—Land Law (Ir.) Act*, 1903, *s.* 7.

The Land Commission having made an offer to purchase an estate from the Land Judge under s. 7 *of the Act of* 1903, *the Land Judge refused the offer, as he considered the purchase-money insufficient, and directed the estate to be put up for public auction under s.* 7 (3). *Upon an application by the petitioner having carriage to have the estate sold in separate lots, as it would be more beneficial than a sale of the entire estate in one lot, the Land Judge gave liberty to the solicitor having carriage to apply in Chambers to have a suitable allotment made of the lands with a view to a sale by public auction under s.* 7 (3) *:*

APPEAL.
Jan., 1907.

Held (*reversing the decision of* ROSS, J.), *that under s.* 7 (3) *the lands put up for public auction should be put up in one lot, the object in view being to test the adequacy of the offer made by the Estates Commissioners.*

Appeal from a decision of Ross, J., dated Jan. 11, 1907, giving liberty to the solicitor having carriage to apply in Chambers to have a suitable allotment made of the lands with a view to a sale by public auction under s. 7 (3) of the Act of 1903. The estate consisted of two main divisions—one, of the agricultural lands, and the other, of town holdings in Ballycastle (Co. Mayo), with adjoining townparks or grazing lands. The Estates Commissioners made an offer, under s. 7 of the Act of 1903, to purchase the entire estate from the Land Judge for £14,596. Of this sum £10,966 was offered for the agricultural estate, £1,280 for the town holdings, and £2,350 for the grazing lands adjoining the town holdings. The tenants appeared to have previously offered £11,597 for the agricultural portion of the estate, and the offer of the Estates Commissioners was accordingly £631 less than the offer of the tenants. As regards the agricultural portion, it was stated that £4,440 would be required to redeem the superior interests, while £6,000 was owing on foot of a mortgage to the National Bank, and £1,100 to another incumbrancer. The town property, or Ballycastle property, consisted of three lots, held under three separate leases for

999 years from Nov. 1, 1903. The aggregate of the head rents was £153. Mrs. O'Hara, the petitioner having carriage, had charges upon the first two lots for £1,650, and the National Bank were first incumbrancers on the third lot for their £6,000 mortgage, and there were puisne incumbrancers. Assuming the head rents of £153 were redeemed at twenty-five years' purchase, the redemption moneys would be £3,836. As the offer of the Estates Commissioners was £3,630 for this portion of the estate, there would be nothing forthcoming to the incumbrancers. The gross rental of the estate was £301, consequently the profit rent was £148. The offer of the Estates Commissioners was, moreover, conditional upon the lodgment of £595 in cash by certain tenants, and the execution by them of insurance policies upon the buildings. Upon Nov. 12, 1906, the Land Judge made an order refusing the offer of £14,596 by the Estates Commissioners, as it was insufficient, and directed the solicitor having carriage of the sale to proceed to bring the estate to public auction, pursuant to s. 7 of the Act of 1903, and on Dec. 17, 1906, the solicitor having carriage applied to the Land Judge to have the entire Ballycastle estate divided into suitable lots, with a view to a sale by public auction, as there was no probability of an outside purchaser being found for the entire estate. The application was made *ex parte* in the first instance, but the Land Judge directed notice to be served upon the necessary

APPEAL.
Jan., 1907.

parties, and, upon the hearing, gave the decision from which the present appeal was taken. The order of the learned Judge referring it to Chambers to have an allotment made was dated Jan. 11, 1907, and from this order the Land Commission appealed.

Ronan, K.C., *A. C. Meredith*, K.C., and *De Renzy* for the Land Commission.—Sec. 7 does not contemplate an estate being sold in separate lots. Sub-s. 3 of s. 7 is to be carried out by means of sub-s. 4, and the latter sub-section can only apply to the whole estate. The real test is the impossibility of working out sub-s. 4 unless the entire estate is sold. Sub-s. 3 only allows the Land Judge to sell the lands comprised in the offer. Sec. 7 was not passed for the benefit of a person having merely a leasehold interest. The legislature did not contemplate the Land Commission would make an inadequate offer. When the legislature wished an estate to be sold in lots or parcels they used these words, as in s. 55 of the Landed Estates Court Act, 1858.

Healy, K.C., for the tenants.

O'Connor, K.C., and *Donaldson* for the solicitor having carriage.—The Land Commission can make an offer for "any part" of the estate under sub-s. 2, but the word "estate" is used in sub-s. 6 when s. 40 is suspended as regards the estate as a whole. The incumbrances on the various lots are different. "Estate" does not mean the lands specified in the offer. The greater in-

cludes the less, and the word "estate" in sub-s. 4 means any part of an estate. Under s. 40 portion of an estate could be sold. Putting the estate up in one lot will prevent the tenants from coming forward to bid.

Authorities cited :—*Galway's Estate*, 40 Ir. L. T. R. 2; XI. Quart. Land Reps., 1, 87; s. 46 of the Act of 1870; *Braddel's Estate* (unreported); *Tottenham's Estate*, IX. Quart. Land Reps., 143; judgment of Holmes, L.J., in *Galway's Estate* (*supra*); order made by Holmes, L.J., sitting for Land Judge, in *Ryan's Estate* (unreported).

SIR S. WALKER, L.C.—We are of opinion that the order made by Ross, J., cannot stand, as it is contrary to the terms of s. 7. [Reads s. 7.] The section is sufficiently clear, and the more it is read the more it becomes so. The Land Commission, when making the offer, is to give particulars of "the land comprised in the offer." The Land Judge, if he does not consider the offer sufficient, is to put up for public auction "the land specified therein"—that is, the area comprised in the offer, which may be the whole or any part of an estate. In the present case the subject-matter of the offer was the whole of the estate. The leading object of the section is to test by public auction whether the offer that has been made by the Land Commission is a reasonable one, and sub-s. 6 provides for the suspension in such case of the provisions of s. 40 of the Act of 1896. How can this section work with

APPEAL.
Jan., 1907.

the order that has been made here by Ross, J.? Supposing there were three lots, and for the first lot only there was a suitable bid, what is to become of the two remaining lots? How is the test of s. 7 to be carried out? The result would be that there would never be a complete sale carried out under the section. On the other hand, if the whole estate is put up in one lot I cannot see that there would be any confusion, as was suggested, in carrying out a subsequent sale under s. 40. The land is turned into money; the money would represent it in the hands of the judge; and he has all the necessary powers to distribute it in the proper proportions. The Court will therefore discharge the order of Mr. Justice Ross as not being in accordance with the duty imposed on him by s. 7. What that duty is, has already been laid down by this Court in the case of the *Ashtown Estate* and *Galway's Estate*. The appellants will get the costs of the appeal.

FITZGIBBON, L.J., in concurring, said:—I entertain no doubt that you cannot change the subject-matter for which the bidder is to offer a price from the subject-matter of the offer made by the Land Commission. It is another illustration of the importance of keeping distinct the duty of the Land Judge under his original jurisdiction and the duty cast on him under s. 7. There is nothing to prevent him from seeing and satisfying himself that the sale which he ultimately sanctions

is a sale just and reasonable having regard to the interests of all the parties.

HOLMES, L.J., gave judgment to the same effect.

Solicitor for the appellants : *Wm. Alexander.*

Solicitor for the solicitor having carriage : *S. C. M'Cormick.*

Solicitor for the tenants : *John Garvey.*

[*Note up on p.* 1065 *of Cherry and Maxwell's Irish Land Acts,* 1903–1904.]

COURT OF APPEAL.

(Before SIR S. WALKER, L.C., FITZGIBBON and HOLMES, L.JJ.)

MOORE, Tenant *v.* M'CLINTOCK, Landlord.

APPEAL.

Nov., 1906.

Nov. 22, 23, 1906.—*Land Law Acts—Town park—Application to fix a fair rent—Agreement fixing a fair rent signed twenty years before such application, but not filed—Effect of such agreement—Evidence*—44 & 45 *Vict., c.* 49, *s.* 58 (2); 59 & 60 *Vict., c.* 47 (1).

Where, on an application by a tenant to fix a fair rent on a holding, it appeared that an agreement fixing a fair rent on the holding had, twenty years previously, been signed by the then landlord, of whom the present landlord was co-heiress-at-law, but such agreement was not filed owing to the neglect of the landlord's agent, and where the rent so fixed had thenceforth been accepted by the landlord:

Held by FITZGIBBON and HOLMES, L.JJ. (*dissentiente* SIR S. WALKER, L.C.), *that the landlord was not estopped from raising the point that the holding was a town park:*

Held also, *that the fact of such an agreement having been signed and acted on was strong evidence that the holding did not bear an increased value as accommodation land:*

But held by FITZGIBBON and HOLMES, L.JJ. (*dissentiente* SIR S. WALKER, L.C.), *that this evidence was out-weighed by the evidence produced by the landlord, and that the application ought to be dismissed.*

The effect of a report by an assessor of the Chief Commission discussed by FITZGIBBON, L.J.

Appeal from an order of FitzGerald, J., fixing a fair rent on the holding. The area of the holding is 4 acres 3 roods 30 perches; it adjoins the town Fintona. The Sub-Commission fixed the fair rent at £4 7s. 6d., allowing 15 per cent. for proximity to Fintona. The old rent was £5 6s. 1d., and it was proved that this rent had been paid since 1884. In that year the predecessor in title of the present landlord signed an agreement fixing that amount as the fair rent of the holding. This agreement had never been filed in the Land Commission owing to an oversight on the part of the landlord's agent. The landlord who signed this agreement died some years before the date of the present application, and was succeeded by the presen landlord. At the hearing before FitzGerald, J , the landlord's agent gave evidence that, taking the townlands adjoining Fintona, and taking two holdings from each townland—agricultural holdings on which fair rents had been fixed—the average rent per acre was 9s. 6d. He also stated that the average rent for town parks near Fintona was 27s. 6d. per acre. The

APPEAL.
Nov., 1906.

assessor inspected the holding and reported that it bore an increased value for accommodation over and above its letting value as a farm. The remaining facts appear sufficiently in the judgment of FitzGibbon, L.J. FitzGerald, J., fixed the fair rent of the holding at £4 14s., and the landlord appealed.

D. Henry, K.C., and *Chadwick* for the landlord (appellant).

Patchell, K.C., and *J. Leech* for the tenant (respondent).

Authorities cited:—*Givan* v. *Moffitt*, 14 L. R. Ir. 252; *Christy* v. *Gordon*, 13 Ir. L. T. R. 79; *Killeen* v. *Lambert*, 10 L. R. Ir. 262; *M'Cann* v. *Downshire*, 28 Ir. L. T. R. 58, 93; *Archer* v. *Caledon*, 28 Ir. L. T. R. 4, [1894] 2 Ir. R. 611; *MacNamara* v. *MacNamara*, 27 Ir. L. T. R. 2, 32 L. R. Ir. 1; *Daly* v. *Wright*, 27 Ir. L. T. R. 65, 32 L. R. Ir. 9.

SIR S. WALKER, L.C., dissenting.—The history of this holding suggests that of a town park, and there is no doubt that it possesses a great many, in fact most, of the elements of a town park, and that Fintona is sufficiently large to have town parks attached to it; but although the assessor has found that the holding bears an increased value as accommodation land I am not convinced that this is so satisfactorily borne out by the evidence as to enable me to say that the landlord has

discharged the onus of proof which lies on him in this regard. What has, however, determined me in the conclusion at which I have arrived is the agreement of June 2, 1884, by which the ancestor of the present landlord agreed with the then tenant of the holding that the fair rent of it should be fixed at the sum of £5 6s. 1d. The rent was so fixed with the intention of the agreement being filed, but this was not done. The agreement was retained by the agent, and remained in his possession. The possession of the agent was the possession of the landlord. If it had been filed there is no question but that, having regard to recent legislation, the point at issue in this appeal could not now have been raised by the landlord. I cannot bring myself, having regard to that agreement, to any other conclusion but that it ought to turn the scale in favour of the tenant as a matter of evidence, and that this holding ought to be treated according to the understanding of the parties in 1884 as having no accommodation value, and as a holding within the Land Law Acts. It was a condition of the fair rent agreement that it should be so treated. In addition to this, the present landlord is one of the co-heiresses-at-law of the landlord of 1884, and I think it would be a fraud on her part to allow her successfully to avail herself of the default of the agent. Under these circumstances, and whilst recognising the difficulty of the case, I should have preferred that it should have been allowed

APPEAL.

Nov., 1906.

to rest on the decision of the two tribunals—the Sub-Commission who inspected the holding and the Chief Commissioner who delivered the judgment we have before us.

FITZGIBBON, L.J.—I disclaim going against the decision of two tribunals, or of any tribunal which heard the case, upon any question except that of the source of the increased value which this holding has been found to bear above that of similar land in the same district. There was express evidence of the existence near Fintona of a class of holdings on which fair rents had been fixed at an average rate of about 9s. 6d. per acre, these being holdings which were fairly to be compared in quality of land with that under investigation in the present case, but where there was no proof of increased value for accommodation. It is not to be forgotten that "proximity value" and "accommodation value" are different in kind, and arise from different causes. "Proximity value" means that the land is worth more to the occupier because it is near something which enables him to make more money out of it as a productive agent. "Accommodation value" arises where a higher price can be got for land, and it is worth more because a particular class of people—namely, the people living in an adjoining town—want it for accommodation purposes; and it is worth more, and they will pay more for it, for those purposes than it would

be worth (or would bring) for use as a merely agricultural or pastoral agent of production. In the *Caledon Case* (*Archer* v. *Caledon*, 28 Ir. L. T. R. 4, [1894] 2 Ir. R. 611), we were asked to believe that 50 per cent.—half the value—was attributable to increased productiveness due to proximity to Caledon. That we refused to do, and we draw the conclusion that this great increase was attributable to the demand of the townspeople for accommodation land. I draw the same conclusion from the increase of the acreable rent from 9s. 6d. to 18s. and 15s., and the 15 per cent. further increase which was allowed by the Sub-Commission Court. Here we have, in addition, the statement of Col. Alexander (which is uncontradicted, and not even made the subject of any qualifying or contradictory evidence on the other side), that this land does bear a considerably increased value as accommodation land. Although this question does not appear to have been developed in evidence on either side before the Sub-Commission, an appeal was taken, and the real question—that of the increased value—was raised and referred to a selected tribunal—namely, the skilled assessor—so that when we are told that we are going against the decision of two tribunals I reply that we are setting up the judgment of the one tribunal which was specially charged and qualified to ascertain the fact which, when established, decides this case in point of law.

APPEAL.
Nov., 1906.

The assessor visited the place, and investigated the circumstances of the holding; he arrived within 9s. at the same value as that of the Sub-Commission, and his finding, which stands before us as the verdict of a jury is in these words. [His Lordship read the assessor's report.] The judgment of FitzGerald, J., gives no reason for disregarding that finding, and I do not see that we are at liberty to ignore the finding of an expert tribunal specially charged with the determination of this vital question of fact. If this finding be right, it concludes the case but for the question of the written agreement of 1884, by which the landlord and tenant agreed to fix a judicial rent on this holding. There is reason to suppose that there was something peculiar in the circumstances of that agreement, and we cannot say on which side. Was this the only consent? There were other tenants in the same position; did this tenant for some accidental reason get an agreement which others who were in the same position did not get? Why has nothing been done on this agreement since 1884? It is proved and admitted on both sides that there are on his estate a number of tenants paying acreably more than an ordinary agricultural rent for their holdings; why do they pay more? We have only the candid confession of the tenant's counsel, "we do not know why." It is a curious compromise between rights and facts that, after all the investigation, the old rent of

£5 6s. 1d. was only reduced to £4 7s. 6d. by the Sub-Commission, and £4 14s. by the Chief Commission, leaving it still far above the agricultural rate of 9s. 6d. per acre. The presumption from all the facts is that this land bears an increased value, for which no explanation is given except that it arises from a demand by townspeople for accommodation land. We have a town of 1,100 inhabitants, of over 300 houses; every householder would naturally like a bit of land. This land is on the roadside, close to the town; there is not a house on it; it has always been used for accommodation purposes; townspeople only have been tenants of it; almost all the neighbouring ground, as shown by the map, is occupied by tenants who are paying high rents, and only one similar holding has been identified on which a judicial rent has been fixed.

HOLMES, L.J.—The evidence given by the tenant before the Sub-Commission established the fact that the various elements which go to constitute a holding a town park existed in this case, with one exception. There was no evidence one way or the other to show whether or not the land bore a higher value by reason of its being accommodation land for the residents of the town. As no evidence was given by or on behalf of the landlord, on whom the onus of proof rested on this question of vital importance, no alternative was open to the Sub-

APPEAL.
Nov., 1906.

Commission, and a fair rent was accordingly fixed. When the case came before FitzGerald, J., it was proved that there were several small holdings immediately round the town of Fintona, the tenants of which lived in that town, and that, with one exception, no fair rents had been fixed in the case of any of these holdings. It was further proved that the rents of these holdings, as compared with other lands in the neighbourhood which were purely agricultural or pastoral, were a great deal higher. This leads to an inference which a Judge might, or might not draw, that these holdings, including the particular holding the subject of this appeal, did bear a higher value by reason of their being accommodation lands. FitzGerald, J., directed his assessor to visit the lands, and, after doing so, the assessor sent in the following report. [His Lordship read the assessor's report.] Under these circumstances the learned Judge would probably have had no difficulty in coming to a conclusion different from that of the Sub-Commission but for one fact of great importance to which the Lord Chancellor has referred. It appears that in 1884 an agreement had been entered into between the landlord and the tenant for the purpose of fixing a fair rent on this holding, and that this agreement would have been filed with the Land Commission were it not that the landlord's agent overlooked the matter. If this agreement had been filed, subsequent legislation would now have bound

the landlord to admit the tenant's right to have a fair rent fixed. But the agreement was not filed, and there is no estoppel on the landlord. The only way we can regard this agreement is as fairly strong evidence for the tenant which must be encountered by other strong evidence if we are to disregard it; and we cannot tell why this agreement was made. It appears that the tenants of other lands similarly situated did not enter into such agreements. It would seem to me that there must have been some peculiar relations existing between the parties which led the landlord to say that we would give this tenant an advantage not given to others. What was done was not enough to make the agreement an estoppel, and the evidence given before the Chief Commission is sufficient to show that the tenant had no right, apart from the agreement, to have a fair rent fixed.

Solicitors for the landlord: *Dickie & Carson.*

Solicitor for the tenant: *W. E. Orr.*

[*Note up on p.* 357 *of Cherry's Irish Land Acts*, 3*rd Edition*, 1903.]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZGIBBON and HOLMES, L.JJ.)

In the matter of the Estate of EDWARD THOMSON.

APPEAL.

April, 1907.

April 23, 1907.—*Landlord and tenant—Land purchase—Redemption of rent—Apportionment—Right of indemnity—Priority—*59 *&* 60 *Vict., c.* 47, *s.* 33 (4).

In the case of lands sold under the Land Purchase Acts, s. 33 (4) *of the Land Law (Ir.), Act,* 1896, *enacts, "Where any liability for any annuity, rent-charge, or rent is apportioned and redeemed out of the purchase-money, and a right of indemnity in respect of such liability exists, the person entitled to the purchase-money shall be entitled to the proportion of the annuity, rent-charge, or rent so redeemed, in like manner as if he had purchased the same . . ."*

The effect of this enactment is to render "the proportion of the annuity, rent-charge, or rent so redeemed" recoverable out of the indemnifying lands in equal priority with the unredeemed residue of such annuity, rent-charge, or rent, and as part of the same.

Appeal from an order of Ross, J., dated Jan. 23, 1907. By an Incumbered Estates Court Conveyance of Nov. 4, 1854, the townlands of Clontygora North, Clontygora South, and Eden-

tubber, were conveyed subject, in conjunction with other lands, to an entire fee-farm rent of £404 5s. 2d., reserved by an indenture of fee-farm grant of April 15, 1852, with such rights of indemnity in respect of an annual sum of £15 13s. 10d., part thereof, against a portion of the lands comprised in the grant, known as Hall's part of Monascreebe, as were given by an indenture of July 29, 1818, but liable to bear the residue of the said rent of £404 5s. 2d. in indemnification of all other lands liable thereto. The lands of Killeen, which are the lands sold in this matter, form portion of the other lands liable to the said rent, and by an Incumbered Estates Court Conveyance of May 9, 1855, they were conveyed subject to the said rent with the like right of indemnity in respect of the above-mentioned annual sum of £15 13s. 10d., and also indemnified against the residue of the said rent of £404 5s. 2d. by the lands of Clontygora North, Clontygora South, and Monascreebe. By an order dated March 7, 1906, £16 7s. 5d., being portion of the said rent of £404 5s. 2d., was apportioned on the lands of Killeen, and the residue of the said rent was apportioned on the residue of the lands comprised in the fee-farm grant of April 15, 1852. By another order, dated June 14, 1906, the said sum of £16 7s. 5d. was ordered to be redeemed out of the purchase-moneys of the lands of Killene. Twenty-seven and a half years' purchase was agreed on as the redemption price, and was paid

APPEAL.

April, 1907.

to the owners of the said fee-farm rent. Upon the application of the vendor, Ross, J., declared him to be entitled to an annual sum of £16 7s. 5d. charged upon the indemnifying lands—*i.e.*, the lands of Clontygora North, Clontygora South, and Edentubber, but "subject and without prejudice to the annual sum of £387 17s. 9d., being the unredeemed portion of the said fee-farm rent of £404 5s. 2d." The vendor appealed from so much of the order of Ross, J., as provided that the said annual sum of £16 7s. 5d. should be puisne to the said annual sum of £387 17s. 9d., and sought, in lieu thereof, a declaration that the said annual sum of £16 7s. 5d. should be charged on the said indemnifying lands in equal priority with the said annual sum of £387 17s. 9d.

D. F. Brown, K.C., and *Pigot* for the vendor (appellant).—The words of s. 33 (4) of the Land Law (Ir.) Act, 1896, are plain. It enacts that "the person entitled to the purchase-money shall be entitled to the proportion of . . . the rent so redeemed, as if he had purchased the same." The section also speaks of "the portion of . . . the rent so purchased," that is the portion of the original fee-farm rent. The transaction must be deemed to have been a purchase of part of the rent, and thus the purchaser of such part cannot be puisne to the owner of the residue. They cited *In re Owen's Estate, No.* 3, [1900] 1 Ir. R. 169; *In re Kennedy's*

Estate, 34 Ir. L. T. R. 212; *Mulchinock's Estate*, [1901] 1 Ir. R. 142.

H. Wilson, K.C., and *Macrory* for Lady de Vesci and others, the owners of the fee-farm rent (respondents).—When part of the rent is apportioned and redeemed it ceases to exist. Sect. 33 (4) creates a new charge on the indemnifying lands. The order for which the appellant asks would be unfair to our clients, as it would diminish the security for the unredeemed portion of their rent. Formerly they had £404 5s. 2d. secured on all the lands. If the appellant's argument were correct, they would now own a portion—£387 17s. 9d.—of £404 5s. 2d., the entire of which would be charged in equal priority on the lands remaining unsold.

SIR S. WALKER, BART., L.C.—In my opinion the order under appeal does not give effect to s. 33 (4) of the Act of 1896. The section enacts that the person entitled to the purchase-money—*i.e.*, the appellant in the case—shall be entitled to the proportion of rent redeemed as if he had purchased the same. It is plain that the appellant must stand in the landlord's place in respect of that portion of the rent which he is deemed to have purchased.

FITZGIBBON, L.J.—I concur. This appeal is an instance of the difficulty which so often arises in the working of the Land Acts, where things are deemed to be that which, in fact,

APPEAL.
April, 1907

they are not. In this case the appellant is entitled to have security for the annual sum of £16 17s. 5d., as if he had purchased the same, as, and being part of, the fee-farm rent of £404 5s. 2d., reserved by the grant of April 15, 1852. The section (s. 33 (4) of the Land Law (Ir.) Act, 1896) does not give the Court power to create a new rent puisne to the unredeemed portion of the old rent; on the contrary, it imposes a duty to give the appellant in this case the same security as he would have got if he had purchased part of the rent from the landlord.

HOLMES, L.J.—I concur. The effect of the section upon which the case depends appears to me to be clear. When the meaning of an enactment is plain, we cannot allow ourselves to be influenced by considerations of hardships which it may involve.

THE COURT ordered the respondent to pay the costs of the appeal.

Solicitors for the vendor (appellant): *T. F. O'Connell & Son.*

Solicitors for Lady de Vesci and others, owners of the fee-farm rent (respondents): *S. S. & E. Reeves & Sons.*

[*Note up on p.* 574 *of Cherry's Irish Land Acts*, 3*rd Edition*, 1903.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Ross, J.)

WOLFE'S ESTATE.

CHANCERY.
Dec., 1906.

Dec. 4, 1906.—*Land Purchase Acts—Negotiation of sales to tenants—Solicitor—Receiver—Remuneration.*

Upon an application to fix the remuneration of a firm of solicitors and of a receiver, who had both been engaged in negotiating the sale of an estate to the tenants under the Act of 1903, *the Land Judge allowed* £70 *to the solicitors and* £30 *to the receiver.*

In this case there were two applications. One application was by John Jones, the receiver in the matter, for remuneration for services rendered by him in connection with sales to the tenants under the Act of 1903. He was appointed receiver in 1893, and had acted as such until the present time. In 1903, Messrs. Hanrahan & Co., the solicitors having carriage, were directed to negotiate with the tenants with a view to purchase. In negotiating the sales, the solicitors constantly wrote to the receiver for information, and he had sworn affidavits in reply to tenants' objections and in respect of other matters. The solicitors admitted the value of his services rendered to them in carrying on the negotiations.

CHANCERY.
Dec., 1906.

The receiver had not directly transacted any negotiations with the tenants, all of which had been carried out by the solicitors under the order of the Court directing them to do so. The other application was on behalf of Messrs. Hanrahan & Co. to fix the amount of the remuneration for their services in the sale of the estate.

O'Brien, K.C., in support of the application of Hanrahan & Co., referred to the works and services performed by them.

[Ross, J.—As a rule I strongly disapprove of solicitors doing work which ought properly to be done by the receiver. The receiver is the person who is best able to negotiate sales to the tenants, as he has more knowledge of their circumstances and affairs than any one else.]

W. S. Norwood for the receiver.

Ross, J.—Under the circumstances I will allow £100 in this case—£70 to the solicitors and £30 to the receiver. In this instance the solicitors were in a position to negotiate the sales, as they happened to be very much in touch with the tenants on the estate.

Messrs. Hanrahan & Co., Solicitors, appeared in person.

Solicitors for the receiver: *George K. Sherlock.*

[*Note up on p.* 1082 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

CHANCERY DIVISION.

(Before Ross, J.)

TYRRELL'S ESTATE.

CHANCERY.

Feb., 1907.

Feb. 13, 1907.—*Land Purchase Acts—Superior interest—Redemption price—Rule against perpetuities.*

Lands were conveyed by a grantor upon trust to pay an annuity of £90 per annum for the support of the Protestant religion, provided, however, that the persons beneficially interested in the estate as the representatives of the grantor should be at liberty, if they thought fit, in lieu of the said £90, to pay the interest on eighteen Russian imperial or railway bonds for the aforesaid purpose. The lands having been sold to the tenants:

Held, *that the annuity could be discharged by the substitution of the Russian bonds, as such an option did not infringe the rule against perpetuities.*

This was a motion on behalf of the petitioner having carriage of the sale, of which the following were the terms of the notice of motion :—" For an order that an annuity of £90, charged on portion of the estate, be discharged by purchase out of the funds to the credit of this matter, and transfer to the Representative Church Body of eighteen Russian imperial or railway bonds of a

CHANCERY.
Feb., 1907.

hundred pounds each." By indenture of Aug. 31, 1889, Jaspar Robert Joly assigned certain lands in the County of Meath, which were sold under the Land Act of 1903, upon, *inter alia*, the following trust :—" To pay and apply £90 per annum out of the rents of the said lands for the support of the Protestant religion in accordance with the thirty-nine Articles of the Church of England within the parish of Castlejordan, in the Diocese of Meath, such payment to commence from the 1st day of May next, provided, however, that the person or persons for the time being beneficially interested in the said estates as the representative or representatives of the said Jaspar Robert Joly shall, if he or they shall so think fit, in lieu of the said £90, pay the interest payable on eighteen Russian imperial or railway bonds for £100 each to and for the aforesaid purpose." The Representative Church Body objected to the substitution of the income of the Russian bonds in lieu of the income of £90.

F. FitzGibbon in support of the motion.—This option does not infringe the rule against perpetuities. No interest is created in any lands

G. W. Walker, K.C. (with him *C. H. Darley*), for the Representative Church Body.—This application contravenes the rule against perpetuities. The rule is the same whether the charge is on real or personal property. They referred to *London and South Western Railway*

Co. v. *Gomm*, 20 Ch. D. 562; Lewis on Perpetuities, p. 164; *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532; *In re Bowen*, [1893] 2 Ch. 491; *Christ Church Hospital* v. *Grainger*, 1 Mac. & G. 460; *In re Randell*, 38 Ch. D. 213; *In re Lord Stratheden*, [1894] 3 Ch. 265; *Muller* v. *Trafford*, [1901] 1 Ch. 54; *Redington* v. *Browne*, 32 L. R. Ir. 347.

Ross, J., after stating the facts, continued.—In the case before me I cannot see how the representative of Jaspar Robert Joly acquired by virtue of this proviso in the option any interest in the hereditament or the lands. It is a personal or collateral covenant unlimited, but not creating any interest in any lands. A purchaser without notice of the perpetual annuity would not be bound by this proviso, and the option could not be enforced against him. I am, therefore, of opinion that the proviso is not affected by the perpetuity rule at all, and I will, accordingly, allow eighteen Russian imperial bonds to be acquired in lieu of the annuity.

Solicitors for the petitioner having carriage: *T. T. Mecredy & Son.*

Solicitors for the Representative Church Body: *Maunsell, Darley & Orpen.*

[*Note up on p.* 1131 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of FRANCES MARY POWER.

LAND COMMISSION.

Dec., 1906.

Dec. 11, 18, 1906.—*Land Purchase Acts—Sale by tenant-for-life—Marriage settlement—Clause providing for settlement of after-acquired property—Bonus—Irish Land Act,* 1903, *s.* 48—*Irish Land Act,* 1904.

Where lands sold under the Irish Land Act, 1903, *were subject to the trusts of a marriage settlement, which contained a clause providing that all real and personal property (if any) not thereinbefore settled, to which the vendor at the time of the said intended marriage, or she or her intended husband, in her right, at any time during the coverture, might be or become entitled, whether in possession, reversion or otherwise, except certain specified articles of jewellery, &c., should be assured and transferred to the trustees upon the same trusts as the settled funds :*

Held, *that the bonus payable under the provisions of s.* 48 *of the Irish Land Act,* 1903, *and s.* 3 *of the Irish Land Act,* 1904, *was not captured by the clause in the settlement, and was payable to the tenant-for-life.*

Question arising on allocation. The vendor was tenant-for-life of the lands sold in this matter under the provisions of her marriage settlement,

dated June 2, 1879, by which property, consisting principally of £11,755 16s. 2d. new 3 per cent. stock, together with all other property to which she was then entitled under her father's will, was vested in trustees upon the trusts therein declared. The trustees were given power to invest in the purchase of land, and to sell again and re-invest, the rents and profits to be applied in the same manner as the income from the trust funds, and in pursuance of the said power had invested the proceeds of sale of part of the settled funds in the purchase of the lands sold in this matter. The settlement also contained a clause to the following effect: It is hereby agreed and declared that all real and personal property (if any) not hereinbefore settled, to which the said Frances Mary Power, at the time of the said intended marriage, or she or the said John Power, in her right, at any time during her now intended coverture shall be or become entitled, whether in possession, reversion or otherwise, except certain specified articles of jewellery, &c., shall be assured and transferred to the trustees to be held upon the same trusts as the settled funds. The bonus appeared on the final schedule as payable to the trustees of the settlement, but the vendor and her husband having mortgaged the bonus, the mortgagees now objected on the ground that the vendor was absolutely entitled.

Morgan Byrne for the mortgagees.

LAND COMMISSION.

Dec., 1906.

Brunskill for the trustees of the settlement.

Authorities cited:—*Ely's Estate*, IX. Quart. Land Rep. 22; *Annaly's Estate*, 53 W. R. 150; *Churchill* v. *Denny*, L. R. 20 Eq. 534; *Re Browne's Will*, L. R. 7 Eq. 231; *Carroll's Estate*, [1906] 1 Ir. 661.

WYLIE, J.—Having reviewed the terms of the settlement. The trustees subsequently, pursuant to the power in the settlement, sold part of the settled funds and invested the proceeds in the purchase of lands. These lands have been sold in this matter by Frances Mary Power as tenant-for-life, and there can be no question that under the Land Purchase Acts, 1903 and 1904, she is now entitled to receive the bonus for her own use, and discharged from the trusts of the settlement, unless it is captured by the clause in the settlement above referred to. The nature and incidents of the bonus have been discussed at length in several cases and decisions with reference to them. In *Ely's Estate*, IX. Quart. Land Rep. 22, the question arose in December, 1903, upon the construction of s. 48 of the Act of 1903, whether the bonus was payable to the vendor, who was tenant-for-life, for his own use, or to the trustees of the settlement? In dealing with this question Ross, J., says:—[Reads portion of judgment on pages 82 and 86.] This decision seems to me to amount to this, that whatever the nature of the bonus may be, though it has an independent existence distinct from the purchase-money, yet it is so

connected with the settled estate as a by-product of the sale that it is captured by and subject to the trusts of the settlement, and that entirely apart from and without any covenant in the settlement to settle other existing or after-acquired property. The same question arose again in the case of *Lady Annaly's Trusts*, 53 W. R. 150, before Kekewich, J., after the Act of 1904 came into force, under a settlement containing a covenant to the effect that if Lady Annaly should at any time during the coverture become entitled in any manner to any estate or interest in any real or personal property, besides the property thereby settled and *besides the real estate settled by an indenture of even date*, she should bring the same into settlement. The learned Judge was of opinion that the bonus would be captured by the covenant, unless it was within the exception "besides the real estate settled by an indenture of even date," which were the lands sold, and in respect of which the bonus was payable, and he held that the bonus was an interest in the real estate sold, and was within the exception and not captured by the covenant, but was payable to the vendor as tenant-for-life for her own use. When the same case came on for allocation the present Master of the Rolls, while sitting as Judicial Commissioner, when referring to and acting upon the decision of Kekewich, J., is reported (5 N. I. J. R. 118) to have said :—"If this question arises in any other case, though as a matter of comity

LAND COMMISSION.

Dec., 1906.

I might have to follow the decision of Mr. Justice Kekewich, still, before doing so, I should deem it my duty to carefully consider the matter." I regret that I have not the benefit of the full considered judgment of the Master of the Rolls to guide me in this case, and I am not aware whether his doubt as to the correctness of the decision of Mr. Justice Kekewich was based upon the nature and character of the bonus or the form and effect of the covenant. I am unable to see any substantial or material difference between the covenant in that case and the one we have to deal with in the present case. Ross, J., in *Ely's Estate*, and Kekewich, J., in *Annaly's Estate*, both held that the bonus was an estate or interest in the settled property, and was, apart from the Act of 1904, captured by and subject to the trusts of the settled land, and, if this be so, it must be outside any covenant to bring into settlement *other* existing or after-acquired property, and cannot be said to be property "not hereinbefore settled," words which, I think, govern the entire clause in the settlement, both as to existing and after-acquired property. In *Churchill* v. *Denny*, L. R. 20 Eq. 534, where the defendant was at the time of his marriage in receipt of half pay, which he subsequently commuted, under 34 & 35 Vict., c. 36, for £2,175, and by his marriage settlement had agreed that if he then was or should during coverture become entitled to any real or personal property of the value of £100 or upwards for any estate or interest

whatever he would bring it into settlement. Sir George Jessel, M.R., held that the commutation money was not bound by the settlement, and, in giving judgment, at page 536, says :— "Then it is said that, as under an Act of Parliament, he had a right to commute the half pay—that is, to sell it—and receive a certain sum from the Treasury, he thus became entitled to a certain sum of money, which, of course, was personal property after the date of the settlement. That depends on the meaning of the words 'shall become entitled.' Now, to become entitled means to acquire a title ; as Vice-Chancellor Kindersley puts it in *Wilton* v. *Colvin*, 3 Drew, 617, 'What is meant by becoming entitled'? 'Does it not always mean acquiring title'? When you find the words 'shall become entitled' you are always referring to some future interest, to the acquisition of some future title. If a man has something to sell and he sells it and gets the purchase-money he does not acquire a future title, for it is his title to the property which enables him to get the money for it or to vary the investment, and varying an investment is not acquiring any title. If a man has a sum of consols and sells it and invests the proceeds in £3 per cent. reduced annuities, could it be reasonably argued that he became entitled to them within the meaning of such a covenant as this? I cannot distinguish it from the case of a man selling consols and buying Blackacre." Now, all that seems to me to apply to this case.

LAND COMMISSION.

Dec., 1906.

The trustees of the settlement sell the Government stock and invest the proceeds in land, and the tenant-for-life, first of the stock and then of the land, sells the land under the Land Purchase Acts, and gets for it what is technically called purchase-money, and also a percentage or bonus. It is the same title that gives her a right to both. She does not acquire a future title to the bonus such as would leave it free from the trusts of the settlement which bound her entire interest in the trust property at the date of the settlement, and make it subject to the covenant to settle after-acquired property. The view of Ross, J., adopted and approved by Kekewich, J., was that the bonus under s. 48 of the Act of 1903 was subject to the trusts affecting the purchase-money. This view appears to me to have been also adopted by the Legislature and embodied in s. 2 of the Act of 1904, subject, however, to the exception expressly enacted by s. 3 (1), that where the vendor is a tenant-for-life the bonus shall be retained by him as his own proper moneys, for his own use and benefit, free and discharged from all claims upon the lands sold, or the purchase-money thereof, and from any trust affecting the same. In the most recent case dealing with the bonus, *Carroll's Estate*, [1906] 1 Ir. R. 661, Ross, J., held that the tenant-for-life was entitled to the bonus absolutely, though there was a Board of Works charge which the purchase-money was insufficient to pay. On all the above grounds, therefore, I am

of opinion, and so decide, that the bonus in this case is payable to the tenant-for-life, and is not captured by the clause in the settlement.

Solicitors having carriage: *Kennedy, Sons & Lloyd.*

Solicitor for the mortgagees: *Mr. Lloyd.*

[*Note up on pp.* 1108 *and* 1161 *of Cherry and Maxwell's Irish Land Acts,* 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of JAMES ARMSTRONG, continued in the name of ARTHUR HERBERT ORPEN.

LAND COMMISSION.

Dec., 1906.

Dec. 18, 1906.—*Land Purchase Acts—Practice—Sale by absolute owner—Death of vendor—Will—Payment of residue to single executor.*

Where in the case of the sale by an absolute owner of an estate under the Irish Land Act, 1903, *the vendor, who was resident in America, died after the purchase agreements had been lodged, but before the advances had been sanctioned, having by his will devised all his property "to his wife for life, with remainder to her children," and probate had been granted in America to one of the executors named in the will, the others having renounced:*

Held, *that the residue of the purchase-money and the bonus were payable to the acting executor, and should be paid to his duly appointed attorney, to whom administration with the will annexed had been granted in Ireland.*

Application to amend the final schedule. The estate had been sold direct to the tenants under the provisions of the Irish Land Act, 1903.

The originating application and agreements for purchase were lodged in the Land Commission on Dec. 13, 1904, and the provisional declaration that the estate was fit to be regarded as a separate estate was made on May 18, 1905. The vendor James Armstrong, tenant-in-fee of the lands sold, died on March 7, 1905, in Baltimore, U.S.A., where he had resided for many years. By his will, dated Jan. 10, 1901, he devised all his property to his wife for life, with remainder to his children, and appointed as the executors of his said will his said wife, Anna C. Armstrong, J. R. Charlton Armstrong, and William E. F. Armstrong. Probate of the will was granted in America to William E. F. Armstrong, the two other executors named having duly renounced. A grant of administration with the said will annexed was obtained in Ireland on June 1, 1906, by Arthur Herbert Orpen, acting under power of attorney from William E. F. Armstrong, and an order was made on June 11, 1906, giving liberty to continue proceedings in the name of Arthur Herbert Orpen. The final declaration by the Estates Commissioners was made in October, 1906. On the vouching of the final schedule the Examiner had ruled that the residue of the purchase-money was payable to trustees, for the purposes of the Settled Land Acts, of the will of James Armstrong when appointed, and an application was now made that the schedule should be amended and that the residue and bonus should be paid out to

LAND COMMISSION.

Dec., 1906.

Arthur Herbert Orpen, as the duly appointed attorney of William E. F. Armstrong, the sole acting executor of the will of the former vendor.

Cecil H. Darley for the vendor.—It is not necessary to appoint trustees for the purposes of the Settled Land Acts, as the estate was not settled land at the date of the death of the testator, and the executor is entitled to receive the money. Conversion took place on the signing of the purchase agreements.

He cited *Meade's Estate*, XI. Quart. Land Rep. 188.

WYLIE, J.—This was personal estate at the date of the death of the vendor, and I will pay the residue and the bonus to Mr. A. H. Orpen.

Solicitors for the vendor: *Orpen & Sweeney.*

[*Note up on p.* 1085 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of LOUISA MARY FRANCES BIRMINGHAM.

Dec. 18, 1906.—*Land Purchase Acts—Practice—Superior interest—Distribution of purchase-money without regard to—Irish Land Act*, 1903, *s.* 62—*Land Law (Ireland) Act*, 1896, *s.* 33 (4).

Where lands sold under the Irish Land Act, 1903, *were subject to a superior rent, but indemnified by other lands of ample value, and no portion of the said rent had been paid by the vendor or his predecessors in title for over twenty years:*

Held, *that an order should be made under s.* 62 (1) *that the purchase-money be distributed without regard to the head rent, and that the Court would not apply the provisions of s.* 33 (4) *of the Act of* 1896.

Sec. 62 (3) *applies to cases where payment has been made within twenty years.*

Application on behalf of the vendor for an order that the proceeds of sale of portion of the lands of Ballybride, or Ballybridebeg, being part of the lands sold in this matter, be allocated without having regard to a superior rent of £18 11s. 10d. payable to the Earl of Essex. By an indenture

LAND COMMISSION.

Dec., 1906.

of fee-farm grant, dated April 24, 1852, the predecessor in title of the Earl of Essex granted the lands of Ballybridebeg, together with a parcel of ground called Blackmoor Park, in the County of Roscommon, subject to the yearly rent of £18 11s. 10d. By an Incumbered Estates Court conveyance dated Dec. 2, 1857, part of the lands of Ballybridebeg, then called Ballybride, containing 55a. 3r. 2p., statute, being the lands sold in this matter, were granted to the predecessors in title of the vendor, subject to the said yearly rent, but indemnified therefrom by other part of the said lands of Ballybridebeg, containing 100a. 3r. 2p. or thereabouts, which were conveyed by Incumbered Estates Court conveyance to the predecessors in title of Farrell M'Donnell, subject to the said rent, and bound to indemnify all the other lands from the payment of the whole or any portion thereof. The indemnifying lands were let at a yearly rent of £100 to one tenant (not a statutory tenant). From the certificate of valuation it appeared that their annual value was £74 10s., and the area 100a. 3r. 32p. The valuation of the lands sold was £46 5s., and no portion of the rent of £18 11s. 10d. had been paid out of the said lands for twenty years and upwards.

Walker, K.C., for the vendor.—An order should be made under s. 62 (3), as an indemnity exists, and that sub-section applies.

[WYLIE, J.—Where no payment has been made

for twenty years, s.-s. 1 also applies, and I prefer to make an order under that sub-section. It is a simpler order than one under s.-s. 3, which is applicable to a case in which an indemnity exists, but where there has been a payment within twenty years.]

Meredith, K.C., for the Earl of Essex.—The order should not be made. The same conditions exists in both sub-sections, as to the other lands being a sufficient security. The meaning and intention of s. 62 is that the security for the superior interest should not be appreciably diminished, and that the value of the security should remain practically the same as regards excess and stability of rental. The section should never be applied unless it is perfectly certain that no injury will be done to the owner of the superior interest, and where a diminution in the value of the superior rent would be caused, as in the present case, the alternative provisions of s. 33 (4) of the Act of 1896 should be applied. The rent of £100 is a rack rent, as appears from the evidence. The selling value of the superior rent would be reduced by two years' purchase if only secured on the indemnifying lands.

Denning for the owner of the indemnifying lands.

WYLIE, J.—I have no doubt whether the valuation, £74 10s., or the rent, £100, be taken that the rent is well secured. The indemnifying lands are grazing lands in Roscommon, and only an expert witness could say that there would be

LAND COMMISSION.

Dec., 1906.

any difference in the price which would be given for the rent of £100. I do not believe that any injury will be done to the owner of the rent. I have no right to make the vendor redeem part of the rent to which the lands sold are liable, but from which they are indemnified.

Solicitors for the vendor: *Vincent & Beatty.*

Solicitors for the Earl of Essex: *Baker & Ringwood.*

[*Note up on p.* 574 *of Cherry's Irish Land Act, 3rd Edition,* 1903; *and p.* 1129 *of Cherry and Maxwell's Irish Land Acts,* 1903-1904.]

LAND COMMISSION.

(Before WYLIE, J.)

OWEN WYNNE, Landlord, *v.* JOHN SWEENY, Tenant.

Jan. 14, 1907.—*Land Law (Ireland) Acts—Practice—Originating notice—Application to transfer proceedings from Civil Bill Court—Notice showing cause against transfer—No affidavit in support of grounds specified—Costs—Rules of Jan.*, 1897, *rr.* 72, 74 *and* 76.

Where a tenant commenced fair rent proceedings in the Civil Bill Court, and, on the landlord applying for the transfer to the Land Commission, served notice showing cause against the transfer, but did not support the grounds therein specified by any affidavit or other evidence:

Held, *that the cause shown should be disallowed with costs against the tenant.*

Motion that the cause shown against the application of the landlord to transfer the proceedings from the Civil Bill Court to the Land Commission be disallowed. An originating notice by the tenant to fix a second term fair rent had been served on the landlord, the Court selected being the Civil Bill Court of the County of Leitrim, and the landlord applied to the Land Commission to transfer the proceedings from the

LAND COMMISSION.

Jan., 1907.

Civil Bill Court to the Land Commission, and served the prescribed notices of the application. The cause shown by the tenant against the notice to transfer specified the following grounds :—" That the application to transfer is made as part of a scheme for delaying and hindering tenants in this part of the country from having fair rents fixed, and forcing them to purchase their holdings at excessive prices, and leaving time for proceedings being taken against tenants by ejectments after service of their originating notices, and for the purpose of delaying these proceedings." The landlord then applied for an order disallowing the cause shown, his application being supported by an affidavit contradicting the statements contained in the notice to show cause, stating that neither ejectment proceedings nor negotiations for sale of the landlord's estate were pending, and further stating that the landlord desired that the rent should be fixed by the Land Commission, as in his opinion there would be less likelihood of an appeal. No affidavit was filed by the tenant in support of the causes alleged.

Hynes, for the landlord, asked that the cause shown be disallowed, and that the tenant be ordered to pay the costs of the motion.

WYLIE, J., said that there were serious charges contained in the notice showing cause served by the tenant, and that no affidavit had been filed and no evidence given in support of

the said charges. Under the circumstances he ordered that the cause shown be disallowed, and that the tenant should pay the landlord's costs of the motion.

Solicitor for the landlord : *Robert Lonsdale.*

Solicitor for the tenant : *L. R. Lipsett.*

[*Note up on p.* 733–4 *of Cherry's Irish Land Act, 3rd Edition,* 1903.]

LAND COMMISSION.

(Before FITZGERALD, J.)

LAND COMMISSION.

Dec., 1906.

THE HON. MRS. J. C. G. EGERTON AND ANOTHER, Landlords; JOHN M'DERMOTT, Tenant.

Dec. 6. 1906.—*Land Law Acts—Appeal—Practice—Status of tenant—Objection on ground that portion of holding sublet—Point not raised before Sub-Commission — Costs — Land Law (Ir.) Act,* 1903, *s.* 88 (3–5)—*Rules of April* 23, 1904, *rr.* 6, 7.

Where, on the hearing of an appeal by the landlord from an order of the Sub-Commission fixing a fair rent, it appeared, during the progress of the case, that portion of the holding had been sublet without the consent of the landlord :

Held, *that, notwithstanding the fact that the point had not been raised before the Sub-Commission and that the notice prescribed by the Rules of April* 23, 1904, *r.* 6, *had not been served, the Court must take notice of the subletting, and that the originating application should be dismissed, but without costs.*

Appeal from an order of the Land Sub-Commission fixing the fair rent of a holding at £67 for a second statutory term. The substantial grounds of appeal set out in the notice requiring

the case to be re-heard were that the tenant was not in *bona fide* occupation of his holding, but had sublet portion thereof in violation of the statutory conditions. From the evidence it appeared that the tenant, Peter M'Dermott, had sublet a portion of the holding to his brother, Luke M'Dermott. The portion aforesaid, which contained about five acres, was detached from the remainder of the holding, and was formed by the said Luke M'Dermott. The facts aforesaid as to the subletting by the tenant did not become known to the landlord until after the hearing before the Sub-Commission. The evidence produced for the tenant was to the effect that the subletting was made in 1885, that the agent had been told of the subletting on two occasions, had refused to accept Luke M'Dermott as tenant of the five acres, but had continued to take the rent from the father of Luke M'Dermott until his death in 1894, and since that time from John M'Dermott. No evidence of subletting had been given nor objection made to the status of the tenant when the case came originally before the Sub-Commission, and the special notice of intention to produce new evidence required by r. 6 of the Rules of April 23, 1904, made pursuant to s. 88 (5) of the Irish Land Act, 1903, had not been served.*

* Rules 6 and 7 are as follows:—

6. If either party desires to offer on the hearing of any appeal or any rehearing, notice of which has been lodged

LAND COMMISSION.

Dec., 1906.

Battersby, K.C., for the landlord.—The subletting by the tenant without the consent in writing of the landlord is fatal. Mere knowledge and acquiescence is not a consent: per Walker (*Thompson* v. *Rossmore*, 32 L. R. Ir. 437).

Cusack for the tenant.—The landlord has waived his right to object to the subletting by accepting rent for twenty years. The fact that there was a subletting was brought to the knowledge of the agent on two occasions, and he took no steps in reference to it. Moreover, as this point was not raised in the Court below, and notice was not given to the tenant in accordance with r. 6 of the Rules of April 23, 1904, the landlord should not now be allowed to raise it.

FITZGERALD, J.—We have frequently had cases of this description in the earlier years of this Court, and we always held that the

after the commencement of the Irish Land Act, 1903, any evidence which could have been, but was not, produced in the Court below, he shall—not later than one week before the date fixed for the hearing of the appeal—serve notice to that effect on the opposite party and upon the Land Commission. The notice shall state clearly the nature of the evidence proposed to be offered and the special grounds upon which it is sought to have it admitted.

7. If either party desires to offer such evidence, but has failed to serve the notice included in the preceding Rules, or if in any event an application for adjournment is made, the Judicial Commssioner may adjourn the hearing of the appeal and make such order as to the payment of costs as in the opinion of the Judicial Commissioner the justice of the case may require.

receipt of rent did not estop the landlord, or deprive him of the rights given to him by the statute. As the point regarding the subletting has been raised, I must hold that it is fatal to the tenants' application, but as it was not raised in the Court below I shall give no costs. As to the point raised by Mr. Cusack, that notice was not given in accordance with the Rules, we have always held that no substantive case can, under such circumstances, be made by the landlord, but the point as to subletting arose on cross-examination during the progress of the case, and the fact having come to the knowledge of the Court that there has been subletting, we must deal with it. We therefore dismiss the originating application without costs.

Solicitor for the landlord: *Clifford Lloyd.*

Solicitor for the tenant: *James Smyth.*

[*Note up on pp.* 1146 *and* 1293 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

CIRCUIT CASE.

(Before FITZGIBBON, L.J.)

TIGHE *v.* BARRON.

CIRCUIT CASE.

March, 1907.

Kilkenny, March 11, 1907.—*Landlord and Tenant—Action for rent—Right to maintain action when purchase agreements have been signed and lodged—Land Law (Ir.) Act,* 1896, *s.* 35 (1).

An action for rent cannot be maintained after purchase agreements have been signed and lodged with the Land Commission.

The Land Law (Ir.) Act, 1896, *s.* 35 (1), *bars such an action.*

This was an appeal by the defendant from a decree given by the County Court Judge for £10 2s., the amount claimed by the plaintiff's civil bill, for the balance of one year's rent due, up to and ending Sept. 29, 1906, by the defendant out of the lands held by him from the plaintiff under a statutory tenancy. The facts proved were as follows:—Defendant on Oct. 2, 1906, signed an agreement to pay to the plaintiff the rent sued for, and upon the same occasion he also signed an agreement to purchase his holding under the Land Acts. The plaintiff on Nov. 30, 1906, signed the purchase agreement, and filled in its date as being Sept. 29, 1906. The purchase agreement was lodged

with the Land Commission on Dec. 21, 1906, On Dec. 10, 1906, the plaintiff served the present civil bill on the defendant.

A. St. G. De Renzy for defendant.—The defendant admits that the rent claimed has not been paid; but this civil bill cannot be maintained, having regard to 59 & 60 Vict., c. 47, s. 35 (1).

W. G. Gibson, for plaintiff, *contra*, referred to *Re Wilson's Estate*, XI. Quart. Land Rep. 113, which had been cited to the County Court Judge.

FITZGIBBON, L.J.—The Land Law (Ir.) Act, 1896, s. 35 (1), provides as follows:—[Reads section.] It is suggested that the defendant is liable because, in addition to the purchase agreement, he signed a special agreement to pay the rent sued for, but the section is clear, and I think its manifest object was to prevent any claim for rent being made after a purchase agreement had been signed and lodged with the Land Commission. No doubt, the rent claimed has never been paid, but the plaintiff could have protected himself by getting it paid before the purchase agreement was signed, or in some other way. I have no alternative but to reverse the decree of the County Court Judge and dismiss the civil bill on the merits: *Re Wilson's Estate*, XI. Quart. Land Rep. 113, has been referred to, but I need not consider it, as in this case it is quite immaterial whether the true date of the purchase agreement was Sept. 29, 1906, on which it pur-

CIRCUIT CASE.

March, 1907.

ports to have been signed, or the date on which it is proved to have been in fact signed.*

Solicitor for defendant and appellant: *W. F. Browne, LL.D.*

Solicitor for plaintiff and respondent: *Lewis J. Watters, LL.D.*

---

*See also *R. (Earl Fitzwilliam)* v. *Wicklow County Council*, 40 Ir. L. T. R. 180, and *Carew* v. *Flynn* (Ct. of App., Feb. 22, 1906, unreported. *Ex rel.* W. G. Gibson, B.L.), in which there was a motion for final judgment and cross-motion to remit, in an action for rent or interest in lieu of rent accrued due prior to signing of purchase agreement by the parties, which purchase agreements had never been lodged with the Land Commission.

W. G. Gibson, for defendant.—It was the plaintiff's duty to lodge his purchase agreements with the Land Commission when they were signed. The operation of s. 35 (1) of the Land Law (Ir.) Act, 1896, cannot be defeated by the plaintiff's omission to lodge them.

Conner, K.C., and *Cooper* for plaintiff.—S. 35 (1) of the Land Law (Ir.) Act, 1896, only bars an action for the recovery of rent when the purchase agreements have been signed and lodged with the Land Commission; here they have not been lodged. Apart from this, there was an express contract, independent of the purchase agreement, that the defendant would pay the plaintiff the rent claimed or interest in lieu thereof.

The King's Bench Division refused the motion for judgment, and remitted the action to the County Court of Co. Waterford, and the plaintiff having appealed from this decision, the Court of Appeal dismissed the appeal.

Solicitor for plaintiff: *Greene Foley.*

Solicitor for defendant: *J. F. Williams.*

[*Note up on p.* 576 *of Cherry's Irish Land Act, 3rd Edition*, 1903.]

CIRCUIT CASE.

(Before FITZGIBBON, L.J.)

MINCHIN *v.* COSTELLO.

CIRCUIT CASE.

March, 1907.

Nenagh, Clonmel, March 1, 4, 1907.—*Land laws — Drainage Acts — "Judicial rent" — "Increased rent" or drainage assessment fixed by Commissioners of Public Works—Not referred to in Land Commission proceedings—Liability for such assessment—Land Act,* 1881, *s.* 5.

A first term rent of £19 6*s.* 1*d. was fixed on the holding in* 1882. *In* 1891 *the Commissioners of Public Works assessed upon the landlord a rent-charge of* £4 19*s.* 10*d. half-yearly for* 22 *years for "arterial drainage" of* 350 *acres, of which the holding in question contained* 37*a.* 2*r.* 30*p., and in* 1892 *the Commissioners of Public Works determined the proportion of such assessment payable by the tenant of the holding at* 16*s.* 1*d. yearly. In* 1905 *a second term rent of* £18 3*s. was fixed on the holding; no reference whatever being made to the drainage assessment, either in the pink schedule or the order of the Land Commission :*

Held, *that the assessment of* 16*s.* 1*d. was still payable by the tenant over and above the fair rent of* £18 3*s.*

CIRCUIT CASE.

March, 1907.

Gabbett v. *M'Carthy*, 30 *L. R. Ir.* 720, *and Enniskillen* v. *Reilly*, 32 *Ir. R.* 372, 27 *Ir. L. T. R.* 82, *commented on.*

Civil Bill Appeal. The facts appear from the judgment.

W. G. Gibson (with him *Sealy*) for the plaintiff.

Dudley White for the defendant.

FITZGIBBON, L.J.—This is an appeal from the dismissal of a Civil Bill brought by the landlord Minchin against the tenant Costello to recover £1 12s. 2d. for two years' arrears of "increased rent," claimed as payable by the defendant to the plaintiff under the Drainage Acts, over and above the "judicial rent" payable for the holding. I reserved judgment to consider the statutes and authorities to which I was referred.

The facts are as follows:—A "first term" judicial rent of £19 6s. 1d. was fixed on the holding on Dec. 26, 1882. By instrument of Oct. 9, 1891, the Commissioners of Public Works assessed upon the landlord Minchin a rent-charge of £4 19s. 10d. half-yearly, payable for 22 years from April 5, 1891, in respect of the improvement by "arterial drainage" of 350 acres of his estate, of which the defendant's holding of 37a. 2r. 20p. formed part. By a further instrument of May 18, 1892, the Commissioners determined the amount of "increased rent" which the defendant John Costello, described as tenant from year to year under a statutory tenancy at the yearly rent of £19,

was to pay in consequence of the improvement of his lands, and fixed the amount at 16s. 1d. per annum, payable from the date of the instrument. On April 4, 1905, Costello obtained an order from the Land Commission fixing the fair rent of his holding for a second statutory term, commencing from May 1, 1904, at £18 3s. The holding was described in the originating notice and also in the fair rent order as having been held at the old rent of £19 6s., and no reference was made to the drainage assessment or "increased rent" of 16s. 1d. If it had been included, the old rent would have been £20 2s. 2d. The pink schedule specifies the improvements on the holding, and makes allowances to the tenant in respect of them as having been made by him, but it does not refer in any way to the improvement by the arterial drainage nor to the "increased rent" payable under the Board of Works assessment. The tenant now contends that the provision in the Land Acts against his being compelled to pay any "higher rent" during the continuance of his statutory tenancy exonerates him from paying anything more than £18 3s. after May, 1904, though it is conceded that he was made liable to pay the "increased rent" of 16s. 1d. during the continuance of his "first term," from May 18, 1892, by the Board of Works instrument over and above his original judicial rent of £19 6s. 1d. Only a few of his receipts are in evidence, some merely acknowledge payments on account,

CIRCUIT CASE.

March, 1907.

but there is a receipt dated Oct. 24, 1891, for £19 6s., "being the year's rent of his holding, ending May 1, 1890." A receipt of Nov. 3, 1893, for the year's rent due and ending May 1, 1892, also states the rent at £19 6s., but on that occasion a rebate was allowed. A receipt of Feb. 5, 1902, for £19 16s. 1d. was given "for one year's rent ending May 1, 1900"; on Nov. 2, 1905, and again on Oct. 31, 1906, he paid £18, and on each occasion a receipt for "one year's rent" was given, no particulars being given of the abatement. It was not disputed, and I find as a fact that, although smaller amounts were accepted, the tenant's legal liability up to the end of the "first term" was for the contract rent of £19 6s. 1d., *plus* the "increased rent," or drainage assessment, of 16s. 1d.—£20 2s. 1d. in all. I have been referred to two cases. In *Gabbett* v. *M'Carthy*, 30 L. R. Ir. 720, the Court of Appeal decided that the Land Commission had jurisdiction to reduce the aggregate rent of a tenant who was liable to an "increased rent" under the Drainage Acts. The headnote contains the curious reason or qualification—"as the reduced rent was not less than the increment imposed by the Commissioners of Public Works," but these words are not in the judgment, which was delivered by Morris, C.J. In that case the tenant paid a rent of £330, and he was liable to a drainage assessment of £129 13s. 3d. Morris, C.J., says:—"If the Land Commission had reduced the tenant's

rent to less than £129 13s. 3d., it might then become necessary for us to decide whether the special enactments of the Drainage Acts were overridden by those of the Land Act in its general terms." The agent proved that £330 had always been paid and accepted as the full rent; he never told the tenant of the drainage charge, he looked on it as completely set aside, and the £330 was to cover both—was to cover everything, including any drainage charge. On this state of facts, Morris, C.J., said.—"There is no question at all in this case. The Land Commission have fixed the rent at £220, which is £90 6s. 9d. over and above the rent of £129 13s. 3d., which the Commissioners of Public Works had the power of assessing, and settled at that amount. How is that inconsistent under the Land Act with the previous declaration that the increased annual value was £129 13s. 3d.?" There is really nothing more to be decided in this case than in any other where the Land Commissioners have chosen to reduce a previously existing rent." That the Land Commission had not "said that the fair rent was £90 6s. 9d. *plus* £129 13s. 3d. he said was a mere matter of form." That case has no bearing on the question now raised, except in so far as it indicates that the Land Commission has no jurisdiction to alter the amount of an "increased rent" assessed or settled by the Board of Works under the Drainage Acts.

Enniskillen v. *Reilly*, 2 L. R. Ir. 372, is an

CIRCUIT CASE.

March, 1907.

important authority on this case, if it does not actually rule it. It came before the King's Bench Division, on a case stated by Holmes, L.J., and they held a judicial tenant liable to pay "increased rent" assessed under the Drainage Acts during the continuance of a statutory term over and above the "fair rent" fixed by the Land Commission. Johnson, J., says that he is not to be taken as assenting to the proposition that the Land Commission has jurisdiction to assess the pecuniary value of the amount of benefit derived by the tenant by means of the drainage works. He says also "the fair rent order does not (and, in his opinion, properly does not) refer directly or indirectly to the drainage works. Though the Drainage Act calls this drainage assessment on the occupying tenant 'increased rent,' it is obvious that in its origin, nature, and quality it is wholly different from rent between landlord and tenant payable by way of compensation for the holding by the tenant of the landlord's land, . . . the amount of which compensation is fixed pursuant to the Land Acts by the Land Commission. It is an addition to the fair rent, and is not a higher rent within s. 5 of the Land Act of 1881, and the defendant is liable to the drainage assessment, or increased annual rent of 14s., as well as to the fair rent fixed by the fair rent orders." Gibson, J., says.—"The amount of increased rent to be paid for the improvement in the land is not contract rent in any sense of the term. The

only matter which is within the jurisdiction of the Land Commission is the ascertainment of the rent for the enjoyment of the holding proper, between landlord and tenant, in the nature of 'a contract rent.' The so-called 'increased rent' is assessed in respect of a specific improvement added to the holding, and, though not usually limited in duration, is in a manner compensation for the drainage charge or tax imposed on the landlord proprietor. It is not affected by the Land Act of 1881." Madden, J., says.—"The mere fact that the annual charge imposed on the tenant by way of recoupment is called 'increased rent,' and (in order to facilitate its collection) is made recoverable as rent proper, does not, in my opinion, constitute it 'rent' for all purposes or bring it within the terms of s. 5 of the Act of 1881." The only distinction between that case and this is that the improvement by the drainage works in that case, though in progress, was not completed when the fair rent order was made. In this case it was completed, and the assessment of the 16s. 1d. was in force when the fair rent for the second term was fixed. The decision establishes that the "increased rent," when assessed during the first term in this case, became payable over and above the judicial rent, and it appears to me to show that, in the opinion of the King's Bench Division, the Land Commission has no jurisdiction over any assessment made by the Board

CIRCUIT CASE.

March, 1907.

of Works under the Drainage Acts, nor any power or duty to deal, when fixing a fair rent, either with the amount of any such assessment or with the "amount of benefit derived by either landlord or tenant by means of the works for the cost of which the assessment is made."

Thus the question for me is reduced to this—Is the increased rent of 16s. 1d. payable by Costello, the defendant, under the Drainage Acts included in and satisfied by the payment of the fair rent of £18 3s. which the Land Commission has fixed on the defendant's holding for the second term; or is that £18 3s. an amount which takes the place of the first term rent of £19 6s. 1d. fixed in 1882, and that alone. So far as this is a question of fact, I feel bound to answer that the £18 3s. is substituted for the £19 6s. 1d., and for that alone. I so find on the terms of the originating notice, the fair rent order and the pink schedule. The notice and order state the old rent as £19 6s. The schedule purports to specify all the improvements which affect the amount of the fair rent, and it makes no mention whatever either of any benefit or improvement from or by the arterial drainage or of any assessment in respect of it. If any improvement derived from that drainage had entered into the calculation of the fair rent it would belong, I presume, to the landlord and to the tenant respectively in the same proportion in which the expense which, in the first instance, was thrown upon the landlord

was recouped to him by the assessment of the 16s. 1d. "increased rent" upon the tenant. There is no trace of any such calculation on the pink schedule. The judges in *Lord Enniskillen's Case* held that the drainage assessment was not contract rent, nor rent of the holding within the meaning of the Land Acts, and if they were right, it was properly left out of consideration in fixing the fair rent under those Acts. In the absence of any evidence to the contrary, I hold as matter of fact that the second term order reduced the first term rent of £19 6s. 1d. to £18 3s. without touching the drainage assessment of 16s. 1d; that the holding mentioned in the two fair rent orders is the same, and that the successive rents are payable for the same consideration, that the 16s. 1d. is payable, not as rent under the Land Law Acts, but as an assessment under the Drainage Acts in respect of works executed by the Board of Works, and not by either landlord or tenant, and that it is still payable by the tenant and recoverable by the landlord over and above and independently of the fair rent of £18 3s. as it was payable over and above and independently of the fair rent of £19 6s. 1d. I must, therefore, reverse the dismiss, and give a decree for the amount claimed—viz., £1 12s. 2d., with the costs of a decree for that amount in the County Court and on appeal. I wish to add that if the Land Commission had shown, either upon the second term order, or upon the pink

CIRCUIT CASE.

March, 1907.

schedule, that the improvement due to the arterial drainage and the assessments on the landlord and tenant in respect of it had been taken into account one way or the other in determining the amount of the fair rent, questions as to jurisdiction, and as to the legality of the course taken, which were suggested in *Gabbett's Case* and *Enniskillen's Case*, would have arisen; and the observations of Morris, C.J., in *Gabbett's Case* would, probably, have suggested some course by which effect could be given to the mode in which the rent was calculated. But *Enniskillen's Case* shows that the King's Bench Division thought that the Land Commission ought not to deal with the drainage improvement or assessment at all, and this may explain the silence of the notice, order and schedule on the subject of it. Landlords and tenants have sometimes been involved in litigation by the omission to show how fair rents are calculated with respect to other burdens—*e.g.*, easements and tithe rent-charge. An instance will be found in *Irish Land Commission* v. *Brown*, [1904] 2 Ir. R. 200, in which I stated a case at the request of both parties, to decide the effect of the omission to consider the existence of or liability to tithe rent-charge when fixing a fair rent, both parties admitting that it had been overlooked. When that case came on for hearing counsel for the Land Commission announced that it had been discovered that the Assistant Commissioner's field book

showed that they had given the tenant a reduction on account of it, though there was an error made in not recording that fact in the pink schedule. In the present case, if the drainage improvement and assessment had been mentioned and the order or schedule had stated whether or how they had been dealt with in calculating the fair rent, this litigation would either not have arisen or would have raised important questions which are not before me.

Solicitors for the plaintiff: *Nolan & Dudley.*

Solicitor for the defendant: *R. X. M. Gleeson.*

[*Note up on p.* 273 *of Cherry's Irish Land Act, 3rd Edition,* 1903.]

IRISH LAND REPORTS.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZGIBBON and HOLMES, L.JJ.).

O'LEARY, Tenant, *v.* SHERLOCK, Landlord.

APPEAL.

May 1, 1907.

May 1, 1907.—*Land Law—Character of holding—Erection by tenant of buildings for agricultural purposes—Annual value of such buildings exceeding annual value of lands—Building necessary for working of adjoining land held by tenant—Residential purpose*—59 & 60 *Vict., c.* 47, *s.* 5 (I) (*a*).

Where the annual value of "agricultural" buildings erected on a holding by a tenant exceeds the annual value of the land, this fact will not preclude the tenant from having a fair rent fixed, if the buildings so erected are necessary for the working of adjoining lands held by the tenant, even though such adjoining lands are not held from the landlord of the holding on which the buildings stand.

Appeal from an order of Fitzgerald, J.,

APPEAL.
May, 1907.

dismissing the tenant's application to have a fair rent fixed. The holding in question contains two statute acres and sixteen perches, and is situated on the county road, about a mile from Bandon. At one time Lord Bandon was the immediate landlord of the holding, but he allowed his interest to drop, and the present landlord acquired by purchase the holding and an adjoining house and grounds. The buildings on the holding consist of an old slated cottage of two rooms with Gothic windows and a recently erected stable for eight horses. About 1855 the holding was let by Lord Bandon to Dennis O'Leary (the husband of the present tenant), who was a cattle dealer and resided on the holding. In his time there were on the holding, in addition to the cottage, some small out-offices of a more or less temporary character, which subsequently disappeared. In addition to the holding in question, D. O'Leary had three other holdings, one of five acres, one of six acres, and one of ten acres; these holdings, which were held from Lord Bandon up to the time when they were purchased by the tenant under the Land Purchase Acts, were separated from the holding in question by the county road, and had no buildings on any of them. D. O'Leary had also another holding of about twenty acres situated some miles away. Soon after the Land Act of 1881 was passed fair rents were fixed on these holdings, and they were afterwards purchased under the Land Purchase Acts. D. O'Leary

died in 1868, and his widow, the present tenant, continued in occupation. After D. O'Leary's death half an acre of the holding was surrendered to the present landlord, and the rent was reduced from £5 to £4. For some time past the cottage has been vacant, and the tenant has resided with her son on a holding some miles away. In 1893 this son erected the eight-horse stable mentioned above. The Sub-Commission fixed the fair rent of the holding at £4 13s. The assessor of Fitzgerald, J., valued the buildings at £150 or £4 10s. *per annum*, and the land at £3 *per annum*. Fitzgerald, J., dismissed the tenant's application on the grounds that the holding was residential and not agricultural or pastoral in character, and that the cottage was the main object of the letting. The tenant appealed.

P. Fleming, K.C., and *A. M. Sullivan* for the tenant (appellant).

H. D. Conner, K.C., and *Norwood*, for the landlord (respondent), cited *M'Farland* v. *Cole-Hamilton*, XI. Quar. Land Rep. 199, 40 Ir. L. T. R. 258, [1907] 1 Ir. R. 41.

SIR S. WALKER, BART., L.C.—The question which we have to determine is whether or not in 1855 the letting of this holding was made for the object of a residence. To determine this we must look at the subject-matter. Was it a letting of a house which happened to have two acres of land around it, or was it a letting of a

APPEAL.
May, 1907.

little farm of two acres with a cottage on it, by no means unsuitable to the land? The cottage has only two rooms, but it was urged that its windows are of a peculiar form. It is a poor little place, and its two rooms have not been occupied for some time. It was argued that it was let as a residence because the tenant had other farms, and took this holding to live on and work the other farms from it. That, however, is not the meaning of s. 5 of the Act of 1896, which speaks of a letting, "the main object of which is for a residence." This was a plain and simple letting of this little place at £5 *per annum*, and it is impossible to describe it as residential. The second branch of the respondent's argument was that in 1898 the tenant "built herself" out of the Act by building a large stable for eight horses. Suppose a byre for eight cows had been built it would not have changed the character of the holding and made it non-agricultural; nor if the tenant sold at fairs the cattle kept in the byre, would that fact have transformed the character of the holding. The stable was intended to be used for all the holdings. It may be an improvement unsuitable for this two-acre holding, and it has raised the valuation on buildings to £6 10s. as against £2 10s. on lands, but buildings such as it are not in their effect the same as the building of a public-house or a mill, which would be inappropriate to an agricultural holding. We are of opinion that the tenant has not "built her-

self" out by erecting this stable, and, therefore, the appeal should be allowed.

FITZGIBBON, L.J.—I concur. I wish, in the first place, to say that the order of Fitzgerald, J., is not in the form which we would adopt in this Court, as no grounds are stated for dismissing the originating application. The following reasons are, however, given by Fitzgerald, J., in his judgment:—"On the whole, looking at the very small size of the holding, its situation close to the town of Bandon, its neighbourhood and its character, its history and the nature of the buildings, I have come to the conclusion that it is really a residential holding and not agricultural or pastoral in character, and that the cottage was the main object of the letting to Dennis O'Leary." Now these are really three reasons rolled into one, and they do not appear to me to be sufficient to decide this case. The small holding must be taken in comparison with the small house. The holding, when taken, consisted of three acres with a cottage. I cannot see how the then tenant can be said to have made the house the main object of the letting. If a man, having a farm of forty acres without a residence, takes a little holding with a cottage on it the former fact, no doubt, explains the reason of his taking the smaller holding, but that does not make the cottage the main object of the letting. As to "building out," I agree with the Lord Chancellor. If a man has a large

APPEAL.
May, 1907

quantity of land held under several tenancies his farm buildings for the whole must almost necessarily be erected on one of the holdings; they may be too much for that holding, but "agricultural buildings," if I may so call them, do not exclude tenants from the benefit of the Land Acts.

HOLMES, L.J.—I concur. Now that forty years have elapsed since D. O'Leary took this holding I am unable to form an opinion as to his intention in doing so. This small house—a kitchen and a bedroom—stood upon three acres of land, and nothing is more common than to find such small farms having small dwelling-houses on them. It was pressed upon us that the tenant has only now served an application to have a fair rent fixed though she could have done so at any time since 1881. That is a circumstance which needs explanation; but in this case the most satisfactory explanation is afforded by the fact that, when the application was made, the rent was raised. These considerations clear away everything in the arguments put forward on behalf of the respondent save the question of the erection of the stable. If a man establishes on a holding a public-house, or a shop, or something inconsistent with farming, he may thereby alter the character of the tenancy; but it is one of the elements of an agricultural holding to have upon it a stable or a byre. The stables in this case are larger than would be suitable for this holding by itself, and both land and stables

APPEAL.

May, 1907.

are used, in conjunction with the adjoining farms, for horses as well as for cows. This user does not make the holding non-agricultural or residential, and, therefore, the tenant is entitled to have a fair rent fixed.

Solicitors: *P. O'Driscoll; R. W. Sherlock.*

[*Note up on p.* 519 *of Cherry's Irish Land Acts, 3rd Edition,* 1903.]

COURT OF APPEAL.

(Before SIR S. WALKER, BART., L.C., FITZ-GIBBON, and HOLMES, L.JJ.)

TYRRELL'S ESTATE.

APPEAL.

April, May 1907.

April 17, May 6, 1907.—*Land Purchase Acts—Superior interest—Redemption price—Option to repurchase—Rule against perpetuities.*

Lands were conveyed by an owner in fee upon trust, inter alia, to pay an annuity of £90 for the support of the Protestant religion, with a proviso that the persons beneficially interested in the lands as the representatives of the grantor should be at liberty, if they thought fit, to pay the interest on eighteen Russian Imperial or railway bonds, in lieu of the said annuity, for the aforesaid purpose:

Held, *the proviso, regarded as an option to redeem the said annuity, was void for perpetuity, and the persons entitled to receive the said annuity could not be compelled to accept eighteen Russian Imperial or railway bonds as the redemption price of the same.*

L. & S. W. Ry. v. *Gomm*, 20 *Ch. D.* 562; *Woodall* v. *Clifton*, [1905] 2 *Ch.* 257, *and Worthing Corporation* v. *Heather*, [1906] 2 *Ch.* 532, *followed.*

Switzer v. *Rochfort*, [1906] 1 *Ir. R.* 399, *commented on.*

Appeal from an order of Ross, J., dated Feb. 13, 1907. The facts are reported at p. 89 *ante*.

G. W. Walker, K.C., and *C. Darley* for the Representative Church Body (appellants).—The option is void for perpetuity: *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562; *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532. If *Switzer* v. *Rochfort*, [1906] 1 Ir. R. 399, and *Attorney-General* v. *Cummins*, [1906] 1 Ir. R. 406, conflict with the foregoing authorities they ought not to be followed. They also cited *Trustees of Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. 540; *In re Bowen*, [1893] 2 Ch. 491; *In re Wood*, [1894] 3 Ch. 381; *In re Ashforth*, [1905] 1 Ch. 535; Lewis on Perpetuities, p. 164.

Matheson, K.C., and *F. FitzGibbon*, for the vendor (respondent) *contra*, cited *In re Cousins*, 30 Ch. D. 203; *In re Game*, [1907] 1 Ch. 276; *In re Randell*, 38 Ch. D. 213; Farwell on Powers, p. 296.

Cur. adv. vult.

The Court delivered judgment on May 6, 1907.

SIR S. WALKER, BART, L.C.—The issue involved in this appeal resolves itself, in substance, into one question—Is the option to redeem the annuity granted by the deed of 1889 void for perpetuity or not? The deed is voluntary, and creates, *inter alia*, a perpetual equitable rent-charge in favour of a charity, with the

APPEAL.

April, May, 1907.

following proviso. [His Lordship read the proviso.] At p. 164 of his book, Mr. Lewis defines a perpetuity in the following terms. [His Lordship read the passage.] I accept that definition. The test to be applied is, whether or not the power or option gives an interest in the land. In the case before us the option may be exercised at any time by the persons whose estate is liable to the perpetual equitable rent-charge; and the decision of Lord Selborne, C., in *Pearks* v. *Mosely*, 5 A. C., at p. 719, shows that, in order to test the applicability of the rule against perpetuities, the instrument creating the power must be construed as if there were no such rule, or in Lord Selborne's words, "as if the whole intention expressed by the words could lawfully take effect." The point arose in *L. & S. W. Ry.* v. *Gomm*, and was considered by Sir G. Jessel, M.R., at pp. 580 and 582 of the report. In that case it was held that the option to repurchase gave an equitable interest or estate in land, and that, as the terms of the covenant showed that the option was intended to be exercisable at a period extending beyond that allowed by the rule against perpetuities, the option was void. In my opinion there is no legal distinction between the proviso, which we have to construe, and a covenant giving the same rights, and, therefore, I think that *L. & S. W. Ry.* v. *Gomm* applies. In addition to that decision we have the authority of Warrington, J., in *Woodall* v. *Clifton*, and in *Worthing Corpora-*

tion v. *Heather*, for saying that even an option to purchase given to a lessee, and exercisable at an indefinite time, is void for perpetuity. During the argument we were pressed with the decision of Sir A. M. Porter, M.R., in *Switzer* v. *Rochfort*. In that case Sir A. M. Porter appears to have been much impressed by the fact that the rent-charge was "secured by power of re-entry and distress, not worked out by the appointment of trustees, nor through the Statute of Uses, nor by a trust, but given directly by the instrument creating it at common law." Here the rent-charge is equitable, but even if that fact is not enough to distinguish the present case from *Switzer* v. *Rochfort*, I still think we ought to follow the decision of Sir G. Jessel, M.R., in *L. & S. W. Ry.* v. *Gomm*, which has been treated as a leading authority since the date of its pronouncement. I may, perhaps, point out that the rule against perpetuities is judge-made law, designed to prevent the mischief which otherwise would arise from the creation of perpetual interests; and this fact may, to some extent, account for the seeming inconsistencies in the exceptions to that rule, of which a covenant in a lease for perpetual renewal is a well-known instance.

FITZGIBBON, L.J.—I concur. Though I have no doubt as to the correctness of our decision, I think there may be some danger lest it should be thought to disturb other cases which have

APPEAL.

April, May, 1907.

long been regarded as well established. I therefore think it necessary to consider carefully the character and effect of the document before us. The deed is quite simple, and is entirely unaffected by any of the rules of law relating to contract. It is a declaration of certain trusts in lands which are thereby transferred out and out by the owner in fee to a trustee. The third trust creates an annuity of £90 in favour of a charity; and, for the purposes of this case, it may be treated as a trust to pay an annuity of £90 to A. B., his heirs and assigns, for ever. Then follows this proviso. [His Lordship read the proviso.] I think it impossible to say that these words were not intended to have the effect which Ross, J., has given to them. Now, who are the people to whom this option is given? The only tenable construction of the proviso is that the option is given to the beneficiaries under the deed; and the trusts declared by the deed show clearly who these people are. The option is, therefore, intended to last as long as any estate given by the deed. [His Lordship read the trusts contained in the deed.] My view of the deed—viz., that the option is given to the beneficiaries under it and not to the trustee—is confirmed by the last clause, which directs the trustee, on the death of the survivor of the settlor and his three daughters, to convey the settled lands to the heir-at-law of the settlor, to be ascertained in the manner therein provided. Regarded

in this light, the case is indistinguishable from *L. & S. W. Ry.* v. *Gomm.* I base my judgment upon the construction of the deed now before me, which I regard as a grant of a rent-charge to A. B., his heirs and assigns, with a power reserved to other persons arbitrarily to purchase the same, such power being intended to remain in force as long as there should be any person in existence answering the description of the heir-at-law of the grantor, ascertainable in the same manner as the heir of His late Majesty George I.

HOLMES, L.J.—I concur. The annuity, of which the redemption price must now be fixed, is a perpetual equitable rent-charge given to a charity. The charitable object prevents it from becoming void under the rule against perpetuities, and thus it may be regarded as equivalent to a gift to A. B., his heirs and assigns. The proviso which follows the gift is vague and obscure in its terms, but the only rational meaning which can be attached to it is that it confers upon the person or persons who may from time to time become beneficially entitled to this estate a power to purchase the annuity by handing over Russian bonds in exchange for it. I agree with Ross, J., in thinking that the law as to perpetual interests is in an unsatisfactory state, of which some of the cases cited to us afford instances. I should find it hard to distinguish *Switzer* v. *Rochfort*

APPEAL.

April, May, 1907.

from the present case, but I consider that decision inconsistent with *L. & S. W. Ry.* v. *Gomm*, which was decided in 1881, and which has never since been questioned. I can find no distinction in the application of the rule against perpetuities to land granted in fee, and to a gift of a perpetual equitable rent-charge; and I am therefore prepared to apply the decision of Sir G. Jessel, M.R., in the last-mentioned case to the facts now before me. I agree with Sir G. Jessel, M.R., in thinking that there is no distinction in law between an option to purchase and a conditional limitation; and in the present case we have an option to purchase given to the person or persons for the time being entitled to the lands out of which the rent-charge issues. The test is whether or not an option or power of purchase *might* violate the rule against perpetuities, and the limitations in the deed before us show clearly that the option was intended to be exercisable at a period beyond that allowed by the rule.

Solicitors for the Church Representative Body (appellants): *Maunsell, Darley & Orpen.*

Solicitors for the vendor (respondent): *T. T. Mecredy & Son.*

[*Note up on p.* 1131 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

(Before LORD O'BRIEN, L.C.J., JOHNSON and WRIGHT, JJ.)

WILKINS *v.* M'GINITY.

APPEAL.

Feb., June, 1907.

Feb. 8, June 4, 1907.—*Landlord and tenant—Notice of surrender—"Three months' notice beforehand"—Length of notice—Legal or calendar months.*

An agreement for a term of 500 *years from Nov.* 1, 1902, *contained a proviso that the tenant should have the option of giving three months' notice of surrender at the end of the first two years. On July* 30, 1904, *the tenant posted a notice of surrender for Nov.* 1, 1902, *addressed to the landlord, which was not received by him until Aug.* 1, 1904 *:*

Held (WRIGHT, J., *dissenting*), *that the notice of surrender was in time.*

Per LORD O'BRIEN, L.C.J. (*following Sidebotham* v. *Holland*, [1895] 1 Q. B. 378), *a notice of surrender for the anniversary of the day on which the tenancy commenced is good.*

Per JOHNSON, J.—*In a contract, in the absence of evidence to the contrary, the word "month" means in law lunar month.*

APPEAL.

Feb., June, 1907.

This was a case stated by Palles, L.C.B., as Judge of Assize, from the Spring Assizes for the County of Louth, 1906. The case was stated as follows :—

1. This was an appeal from a dismiss by the County Court Judge of a Civil Bill brought by the plaintiff to recover the sum of £30, money due and owing by the defendant under an agreement in writing, dated the 2nd October, 1902, which the defendant agreed and undertook under the said agreement to pay, and for money paid by the plaintiff for the use of the defendant at his request; and for money found to be due from the defendant to plaintiff on an account stated between them, all within the past six years. By an agreement in writing, dated 2nd October, 1902, and made between Joseph P. M'Ginity, the defendant, of the one part, and Robert Wilkins, the plaintiff, of the other part, therein described, the defendant agreed to let, and the plaintiff agreed to take, certain premises for the term of 50 years from the 1st day of November, 1902, subject to the yearly rent of £100. The said agreement provided amongst other things that the plaintiff should erect a hay-shed and office on the said premises at a sum not exceeding £30, and further provided that the plaintiff should be at liberty to surrender the premises at the end of the first two years on giving three months' notice beforehand of his intention to do so, and in the event of such surrender that the plaintiff should be entitled to be recouped in the actual sum expended by him in the erection of the said shed and office, and no more, the amount of the said expenditure not to exceed the sum of £30. The said agreement is incorporated herein.

2. The plaintiff entered into possession of the said premises under the said agreement and erected the said hay-shed and office at an expense exceeding the sum of £30.

3. On the 30th July the plaintiff sent to the defendant, by registered post, a letter intimating his intention to surrender the said premises on the 1st November, 1904. The said letter was addressed to "Joseph P. M'Ginity, merchant, Dundalk," and

should, in ordinary course, have been delivered to the defendant on Sunday, 31st July. It was proved, however, that the said letter was not in fact delivered at the defendant's premises, or otherwise delivered to the defendant, or brought to his knowledge until the morning of Monday, August 1st. I refer to the said notice.

4. On these facts it was contended on behalf of the defendant that the notice of surrender was late, and on behalf of the plaintiff (*a*) that "months" in the said agreement meant in law lunar months, and that, therefore, the notice was in time; and (*b*) that in any event a notice delivered on the 1st August, 1904, intimating intention to surrender on 1st November, 1904, was a sufficient notice within the meaning of the said agreement.

I held as a fact that notice was not given to the defendant until the 1st August, and was of opinion that such notice was not sufficient notice under the agreement, but, at the request of the plaintiff's counsel, consented to state a case on this latter point.

If my ruling on this point is wrong in law then the plaintiff is entitled to a decree for the sum of £30, and costs, otherwise the dismiss should be affirmed.

The question for the opinion of the Court is whether my decision of the foregoing question of law was correct.

C. PALLES.

24th January, 1907.

The material portions of the agreement were as follows:—"The said J. P. M'Ginity shall let and the said R. Wilkins shall take" the premises "from the 1st day of Nov., 1902, at the yearly rent of £100, payable half-yearly in advance . . . the first payment in advance to be made on the execution of these presents, and the payment of the remainder of the said half-yearly rent shall be payable on the 1st day of May and 1st day of Nov. in each year." . . . "The said lease shall

KING'S BENCH.

Feb., June, 1907.

contain a covenant that the lessee shall, within a reasonable time, erect a hay shed and office in addition to the said premises to be demised, at a sum not exceeding £30, and shall also contain a clause to surrender at the end of the first two years, on giving three months' notice beforehand of such intention, or in case of the death of the lessee, his executors, administrators, and assigns shall be at liberty to surrender the said premises within three months after the death of the said lessee, and in the event of surrender by the lessee in his lifetime within the time mentioned, that the said lessee, his executors, administrators, and assigns, shall be entitled to be recouped in the actual sum expended by him in the erection of the said shed and office, and no more, and in no case shall the amount of such expenditure exceed the sum of £30." The following is the notice of surrender :—

DUNDALK, *July* 30, 1904.

DEAR SIR,—I hereby give you notice that I intend giving you up possession on 1st November next of my holding known as Victoria Mills, which please note.

Truly yours,

ROBERT WILKINS.

Mr. J. P. M'Ginity,
Merchant, Dundalk.

Chaytor, K.C., and *Hanna* for the plaintiff.

Healy, K.C., and *Donaldson* for the defendant.

Cur. adv. vult.

Judgment was delivered on June 4, 1907.

LORD O'BRIEN, L.C.J.—The defendant in this case insists upon the very letter of his agreement,

and if his view is correct we must give effect to it. The first question which we must consider is what is the agreement. What is the intention of the defendant as disclosed in the agreement? What is the meaning of the word "months," does it mean lunar or calendar? If it means lunar months the notice of surrender was *ex concessis* in time. If in the expression in the agreement, "from the 1st day of November, 1902," the word "from" excludes the 1st day of November, 1902, from the tenancy the notice of surrender was certainly in time. Even assuming that "months" meant calendar months, and that the 1st day of November, 1902, was included in the tenancy, I am of opinion that the notice was in time: see the judgment of Gibson, J., in *Irish Land Commission* v. *Massereene*, [1904] 2 Ir. R. 513. The judgment of Lindley, L.J., in *Sidebotham* v. *Holland*, [1895] 1 Q. B. 382, is most important with regard to the present question, although that case dealt with a notice to quit and not a notice of surrender, for there is no material difference between the two. In that case the plaintiff, by an agreement in writing, agreed to let a house to the defendant as a yearly tenant, "commencing on May 19, 1890." On Nov. 17, 1893, the plaintiff gave the defendant notice to quit on May 19 following. The question was not as regards the length of the notice, for the notice was served on Oct. 17, but whether a notice to quit on the anniversary

KING'S BENCH.

Feb., June, 1907.

of the day of the commencement of the tenancy—viz., May 19—was a good notice. At p. 383, his Lordship said:—"If, therefore, notice to quit on the 18th were given it would, no doubt, be good. Indeed, it is well settled that a notice ought to expire on the last day of the current year. But, although a half-year's notice to quit on the 18th would be correct, it does not follow that a notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not. I have looked at all the decisions which were referred to in the argument, and at many more, and I can find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case. The validity of a notice to quit ought not to turn on the splitting of a straw." Following this reasoning in the present case, the notice of surrender served on Aug. 1, 1904, for Nov. 1, 1904, is good. However the case is to be viewed, and whether "months" meant lunar or calendar months, and whether the tenancy commenced on the 1st or 2nd of Nov., 1902, I am of opinion that the notice of surrender was in time. See also *Page* v. *More*, [1850] 15 Q. B. 684, and *Fleury* v. *O'Reilly*, [1906] 40 Ir. L. T. R. 125. The question put by the Lord Chief Baron must be answered accordingly, and the plaintiff declared entitled to a decree for £30 with the

costs of this argument, including the costs before the Lord Chief Baron.

JOHNSON, J.—In this case the plaintiff resides in Belfast and the defendant in Dundalk. The notice of surrender was received by the defendant on the morning of Aug. 1, 1904. The agreement was for a term of 500 years, from Nov. 1, 1902, with a proviso that the plaintiff should be at liberty to surrender the premises at the end of the first two years on giving three months' notice of his intention to do so, and, therefore, he had a period up to a reasonable hour on Nov. 1, 1904, in which to surrender. As to the question whether the word "months" in the agreement meant in law lunar or calendar months, in my opinion the legal meaning of the word "month" is lunar month. It has been decided by judges in numerous cases that in legal matters "months" means lunar months, although in commercial transactions calendar months are meant. See the judgment of Denman, C.J., in *Simpson* v. *Margitson*, [1847] 11 Q. B. 30, and of Wood, V.-C., in *Rogers* v. *Dock Co. at Kingston-upon-Hull*, [1864] 34 L. J. Ch. 165. It required the authority of a Statute to change this rule of common law. See the Interpretation Act, 1889, s. 3, and the Bills of Exchange Act, 1882, s. 14 (4). There is no evidence in this case to show that "months" was intended by the parties to mean calendar months, and I am, therefore, of opinion that the notice of

KING'S BENCH.

Feb., June, 1907.

surrender which was given was in time, and that the plaintiff is entitled to a decree.

WRIGHT, J. (*dissenting*).—The whole question in this case is as to the sufficiency of the notice of surrender of the premises, which was posted by the plaintiff on July 30, 1904, but not received by the defendant until Aug. 1, 1904. We must decide whether the words in the agreement "on giving three months' notice beforehand" mean in law three lunar months or three calendar months. The case of *Rogers* v. *Dock Co. at Kingston-upon-Hull*, [1864] 34 L. J. Ch. 165, is much in point. In it Wood, V.C., decided that "where a tenancy from year to year is determinable upon six months' notice to quit, a notice given six lunar months prior to the expiration of the year is sufficient to determine the tenancy." Nor does that decision stand alone, for prior to the year 1850, where the word "month" was used in a Statute, it was understood to mean lunar month. But that rule has long been changed, and by the Interpretation Act, 1889, s. 3, it is provided that "in every Act passed after the year 1850, whether before or after the commencement of this Act, the expression 'month' shall mean calendar month, unless the contrary intention appears." See also General Orders, 1854, r. 6, carrying out the provisions of the Common Law Procedure Amendment Act (Ireland), 1853. In commercial contracts the word "months" has been decided

to mean calendar months: see *Hart* v. *Middleton*, [1845] 2 C. & K. 9; but in the case of written instruments the general rule is that the intention of the contracting parties must be sought for and carried into effect: see *Lang* v. *Gale*, [1813] 1 M. & S. 111. I am clearly of opinion on the whole case that the expression in the agreement "on giving three months' notice" meant on giving a quarter's notice, and, therefore, that the word "months" meant calendar and not lunar months. The 1st Nov., 1902, was the first day of the term, so the first and each succeeding year of the term would end on Oct. 31. Therefore, notice of surrender could have been given for Oct 31, 1904, and should have been served on July 31, 1904. See also *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378. In this case the notice of surrender, which was for Nov. 1, was not served until Aug. 1, and was, therefore, not three calendar months' notice. I am of opinion that the notice was bad in law, and that the dismiss should be affirmed.

Solicitor for the plaintiff and appellant: *Robert Espinasse.*

Solicitor for the defendant and respondent: *A. Nicholas Sheridan.*

[*Note up on pp.* 217 *and* 220 *of Cherry's Irish Land Acts*, 3*rd Edition*, 1903.]

CHANCERY DIVISION—LAND JUDGES.

(Before Ross, J.)

M'Gloin *v.* Irish Land Commission.

Land Judges.

Feb., 1907.

Feb. 27, 1907.—*Land Purchase—Order fixing fair rent—Power to deem a tenant to be a purchaser —Offer of Estates Commissioners—Act,* 1903, *s.* 19.

After an order has been made under the Land Act of 1903, *deeming a tenant to have accepted an offer made to him by the Land Commission, there is no jurisdiction to fix a fair rent.*

George L. Tottenham sold an estate in County Leitrim for the purpose of its re-sale by the Land Commission to the tenants. Patrick M'Gloin was a judicial tenant under a joint fair rent agreement dated March 18, 1892. From the date of the fair rent agreement Patrick M'Gloin got separate rent receipts, another receipt being given to his co-tenant. Patrick M'Gloin alleged that he had signed a purchase agreement to buy at twenty-one and a half years' purchase. Difficulty arose in respect of the purchase agreement, and it appears to have never become operative owing to differences between M'Gloin and the co-tenant, and the latter refused to sign any purchase agreement. In 1904 the Land Commission endeavoured to get over the difficulty by getting M'Gloin to sign another

purchase agreement at a different purchase price. This proposal also proved abortive, owing to a claim for increased land by the co-tenant. The Land Commission then brought a Civil Bill for five and a half years' arrears of rent to Nov. 1, 1905, against Patrick M'Gloin and the co-tenant. This Civil Bill was dismissed by the County Court Judge on the ground that the defendants were not joint tenants, and ought to have been sued separately for their respective shares. On Dec. 20, 1905, Patrick M'Gloin issued an originating notice to have a fair rent fixed against the Land Commission as landlords; this came on for hearing on March 15, 1906. Prior to this—viz., on Feb. 12, 1906—the Land Commission sent Form N. under s. 19 of the Act of 1903 to be accepted by Patrick M'Gloin. A few days before the Land Commission Sessions were held, on March 15, the court valuer was directed by the Land Commission not to value the lands as the estate was in their hands, and he acted upon these instructions. On March 15, 1906, the solicitor for the Land Commission applied to have the second fair rent application adjourned. This application was refused, but, owing to the court valuer not having inspected the lands, the County Court Judge adjourned the case to Ballinamore Quarter Sessions, which were held on March 26, for the report of the court valuer, and to deliver judgment. In the interval, on March 24, the Land Commission made an order, pursuant to s. 19, declaring

LAND JUDGES.

Feb., 1907.

M'Gloin to be deemed to have accepted the offer made to him on Feb. 12. This offer was subsequently communicated to the County Court Judge and to M'Gloin, and the former ultimately fixed the fair rent of the holding at £5 a year. From this order the Land Commission appealed.

H. M'Dermott for the tenant.—The order is bad on its face. The offer made by the Land Commission was accompanied by a letter, which must be read with Form N, and which contained additional conditions. That letter is part of the offer, and is not recited in the order.

Jellett, K.C., and *W. E. Wylie* for the Land Commission.—The Estates Commissioners have the same powers under s. 19 as the Land Judge has under the fortieth section.

ROSS, J.—I wish it to be understood that I am making no comment whatever on the merits of the case nor upon the way in which the Estates Commissioners have dealt with the tenant: it is not before me. The Estates Commissioners have many powers conferred upon them, and amongst them are the powers of compelling a small number of tenants to be deemed to have purchased an estate which the Estates Commissioners have acquired. This compulsory power was given to them by s. 19 of the Act of 1903. They have attempted to exercise that power, and the only question is the technical point that in order to make the order a good one there is a condition precedent—

namely, that there should be an offer made to the tenant by the Estates Commissioners. There is no doubt whatever that there was a proper offer in the prescribed form, and that that was sent by the Estates Commissioners to the tenant, and if he had signed that offer and sent it back to the Estates Commissioners it would have had the effect of wiping out the arrears of interest and of rent. As a proper offer has been made to the tenant, and as he has not accepted that offer, and as all the conditions precedent in s. 19 of the Act of 1903 have been fulfilled, the order was perfectly good upon its face, and all the necessary preliminaries have been complied with. I am, therefore, obliged to differ with the County Court Judge, and discharge the order he has made fixing a second term fair rent.

Solicitor for the tenant: *L. R. Lipsett.*

Solicitor for the Land Commission: *Wm. Alexander.*

[*Note up on p.* 1079 *of Cherry and Maxwell's Irish Land Acts,* 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of MARIANNE DOYLE and ELIZABETH CAMPION; continued in the names of the said MARIANNE DOYLE and THOMAS HENRY CAMPION, Administrator of said ELIZABETH CAMPION, deceased.

LAND COMMISSION.

Jan., Feb., 1907.

Jan. 14, Feb. 7, 1907.—*Irish Land Act*, 1903—*Sale by absolute co-owners in fee-simple—Conversion—Death of one vendor—Executor entitled to moiety of deceased vendor.*

On the sale of an estate under the provisions of the Irish Land Act, 1903, *the vendors were two co-owners in fee-simple, and one of them died before the advances applied for had been sanctioned. On a question being raised as to whether conversion had taken place, on the ground that the purchase agreement was invalid as infringing the rule against perpetuities:*

Held, *that the agreement was valid and enforceable against the deceased co-owner, that consequently her moiety had been converted at the time of her death, and that her personal representative was entitled to a moiety of the residue of the purchase-money.*

Question arising on allocation. The vendors Marianne Doyle and Elizabeth Campion, who were tenants in common in fee of the lands sold in this matter, had entered into an agreement, dated Aug. 1, 1904, for sale direct to the tenants under the provisions of the Irish Land Act, 1903. The originating application was lodged with the Land Commission on Oct. 31, 1904, the agreement for purchase on Dec. 7, 1904, and a provisional declaration that the lands were fit to be regarded as a separate estate was made on Jan. 17, 1905. Mrs. Elizabeth Campion died on Jan. 28, 1906, intestate and without issue, leaving her surviving her husband, Thomas Henry Campion, and her said sister, Marianne Doyle, her heiress-at-law. The purchase agree ment was sanctioned on Feb. 23, 1906. On June 22, 1906, an order was made continuing proceedings in the names of Marianne Doyle and Thomas Henry Campion as administrator of Elizabeth Campion, and on July 19, 1906, the final declaration was made, and the purchase-money was paid into the bank. Marianne Doyle now claimed to be absolutely entitled to one moiety of the residue of the purchase-money in her own right, and to the other moiety as heiress-at-law of Elizabeth Campion; and Thomas Henry Campion claimed the latter moiety, as personal representative of Elizabeth Campion, on the ground that it had been converted into personalty prior to her death.

LAND COMMISSION.

Jan., Feb., 1907.

Herbert Wilson, K.C., for Marianne Doyle.

Myles Kehoe, K.C., for Thomas Henry Campion.

Cur. adv. vult.

WYLIE, J. [having reviewed the facts].—In the arguments of counsel two questions were raised—(1) Was there a valid agreement binding on, and enforceable against, Mrs. Campion for the sale of her moiety at the time of her death? and (2) if there was, in the events that have happened, was her moiety converted into personalty at the date of her death? I did not understand Mr. Kehoe to contend, nor do I think he could contend successfully, that if the agreement was not valid and binding on, and enforceable against, Mrs. Campion at the time of her death, conversion of her moiety into personalty could be effected as of that date by anything that has occurred since. On the other hand, Mr. Wilson did not appear to me to contend that, if there was such a valid agreement, conversion did not take place prior to the death, the agreement for sale being afterwards sanctioned and carried out, and if he did, I would decide against him on that point, being satisfied to base my decision on the judgment of Lord Justice Holmes in *In re Sherlock's Estate*, [1899] 1 Ir. R. 561. Therefore, it seems to me that the only question I have really to decide in this case is the first question. The validity of this agreement was challenged by Mr. Wilson on one ground only—viz., that, there being no limit of time fixed by the agree-

ment within which the conditions on which the carrying out of the agreement depended must be performed, the agreement is void as a violation of the rule against perpetuities, and in support of that contention counsel referred to *London and South Western Ry.* v. *Gomm*, 20 Ch. D. 562, and the references thereto in *Talbot Crosbie's Estate*, [1905] 1 Ir. R. 570, and *Switzer* v. *Rochford*, [1906] 1 Ir. R. 399. [Refers to the facts in *London and South Western Ry.* v. *Gomm*, and to the judgment of Jessel, M.R., as to the very essence of the contract being *that it should be indefinite in point of time.*] Now that being the effect of the agreement in that case, it followed as a matter of course, if the rule against perpetuities applied to a case of contract, as the Court held it did, that the covenant was a violation of the rule and was void. But let us look at the contract in the present case. It is a contract for sale under the Land Act of 1903. Under the provisions of that Act every agreement for the sale of a holding is, and must be, conditional on the sale of an "estate" of which the holding forms a part (ss. 1 to 7), and in order that any lands may constitute an "estate" under the Act the Estates Commissioners must declare them fit to be regarded as a separate estate for the purposes of the Act (s. 8). In the case of a direct sale, as in this case, it is also an essential condition to carrying out the agreement that an application should be made for an advance of the purchase-money, and that the

LAND COMMISSION.

Jan., Feb., 1907.

Estates Commissioners should sanction such advance. This latter condition also applied to all agreements for sale under the Land Purchase Acts prior to 1903, and the forms for such agreements were so framed. And so under the Rules made in pursuance of the provisions of the Act of 1903, s. 23 (13), for carrying into effect the prior provisions of the Act as to sales, the prescribed form for an agreement for sale is conditional in its terms, and could not be otherwise. Rule 19 of the above rules requires that agreements for sale under the Act shall be in the prescribed form, and accordingly, on Aug. 1, 1904, the vendors in this case entered into an agreement for sale in such form with their four tenants. [Reads clauses 1 and 3, and refers to other provisions contained in the agreement.] And the provisions of the Act requiring, and the parties having it in contemplation, that some substantial period must elapse before the sale can be carried out, the 7th clause provides: [Reads.] Rule 1 of the above Rules provides that proceedings for sale under the Act of 1903 by a vendor for sale of an estate to persons other than the Land Commission shall be commenced by an originating application in a prescribed form, and accordingly the vendors in this case, in accordance with the rules, lodged an originating application with the Estates Commissioners on Oct. 31, 1904, and the above agreement for purchase and application for an advance was lodged in December, 1904. Pur-

suant to these applications the Estates Commissioners directed their inspector to inspect the holdings comprising the estate, and make the necessary inquiries, and report to them the result. All this was done, and the report made on Jan. 25, 1906, prior to the death of Mrs. Campion. Now it is contended on behalf of Marianne Doyle, the other vendor, who was a moving party in all these proceedings, and who has since the death of her co-owner, in conjunction with her co-owner's administrator, carried out the sale to completion on foot of the above agreement, that the said agreement was void by reason of its violating the rule against perpetuities. There might be a question whether Mrs. Doyle by her own action in carrying out the agreement for sale is not now estopped from questioning its validity, but I prefer to decide this case on the general ground raised by her, because if her contention is good in law every one of the thousands of agreements already lodged with the Estates Commissioners is invalid. Now, what is the effect of the agreement of the vendor in the case? It is a present agreement for sale to be carried out under, and in accordance with, the provisions of the Act of 1903 and the Rules made thereunder, containing all the elements of a valid contract fixed and specified, but it does not fix any time for completion, or within which the necessary conditions for completion must be fulfilled, and the contention is that this absence of a time limit invalidates the agreement. In an ordinary

LAND COMMISSION.

Jan., Feb., 1907.

case if no time is fixed for completion in an agreement for sale, it is, I think, well settled that the law would imply a reasonable time, and if either party were guilty of any unreasonable delay the other could, by a notice, fix a reasonable time for completion, and at the expiration of such time rescind. This power of either party thus to compel completion or rescind prevents the contract in such a case from tying up the property beyond reasonable limits. In the case relied upon by Mr. Wilson, the *London and South Western Ry. Co.* v. *Gomm*, as pointed out by the Master of the Rolls in the passage I have quoted from his judgment, the implication of a reasonable time would contradict the terms of the agreement and be contrary to the expressed intention of the parties, but there is nothing in the agreement in this case inconsistent with the implication of a reasonable time or to prevent either party from insisting that the agreement should either be carried out or rescinded within a reasonable time. Besides, the agreement in this case is made subject to r. 20 of the above Rules, which requires the agreement for sale to be lodged with the Estates Commissioners within two months from its date, and r. 40 provides that, in case of undue delay, the person having carriage shall be required by notice to attend and explain delay, and the Commissioners may transfer the carriage or dismiss the proceedings, so that, in this way also, the agreement can either be completed or got rid of within a reasonable time.

I am, therefore, of opinion that the agreement for sale in this case was valid and binding on Mrs. Campion at the time of her death, and in the events that have happened the estate must be deemed to have been converted at the time of her death, and that her moiety of the proceeds goes to her personal representative.

Solicitors for Marianne Doyle: *Brown & M'Cann.*

Solicitor for Thomas Henry Campion: *D. O'Connell Miley.*

[See p. 185 *post.*]

[*Note up on p.* 381 *of Cherry's Irish Land Acts, 3rd Edition,* 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of RICHARD W. SMITH.

LAND COMMISSION
Feb., 1907.

Feb. 12, 1907.—*Land Purchase Acts—Irish Land Act*, 1903—*Practice—Redemption of terminable annuity—Redemption price.*

On the redemption of a terminable annuity, charged on lands sold under the provisions of the Irish Land Act, 1903, *the annuitant is not necessarily entitled to have the redemption price fixed at a sum sufficient to purchase a government annuity of similar amount.*

Application by vendor to the Court to fix the redemption price of the sum of £10 10s., portion of a life annuity of £75 payable to Mrs. Marcella Moore, charged on the lands sold, and upon other lands of the vendor. This annuity had been apportioned by the Court between the lands sold and those retained by the vendor, and the amount which the order for apportionment declared should be borne by the lands sold was the sum of £10 10s. It appeared from the affidavits that the annuitant was 89 years of age, and she claimed that the redemption price thereof should not be less than £57 17s. 6d., the amount necessary

to purchase a government annuity for the same amount for a person of her age.

W. S. Norwood for the vendor.—The Court need not of necessity fix the redemption price at an amount sufficient to purchase a similar government annuity. As in every other case, all the circumstances must be considered. He referred to *Estate of Irish Land Commission*, 26 Ir. L. T. R. 115.

H. Macaulay FitzGibbon for the annuitant.—The annuitant is entitled to a sum sufficient to purchase a government annuity of amount similar to that redeemed. She is now being compelled to part with an ample security.

WYLIE, J., fixed the redemption price at £50.

Solicitor for the vendor: *Frederick Hale.*

Solicitors for the annuitant: *Collis & Ward.*

[*Note up on p.* 1133 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of the EARL OF BANDON.

LAND COMMISSION.

Feb., 1907.

Feb. 4, 7, 1907.—*Land Purchase Acts—Irish Land Act*, 1903—*Bonus—S.* 48 (1)—*Estate so incumbered that vendor is not entitled to receive for his own use any part of the rents and profits—Meaning of—Arrears of interest on incumbrances.*

In cases of sales of estates under the Irish Land Act, 1903, *solvency as to income is the test to be applied in ascertaining whether "an estate is so incumbered that the vendor is not entitled to receive any part of the rents and profits for his own use." Accordingly, where in the case of an estate, the annual rental of which exceeded the outgoings, the vendor had appointed a receiver who was bound (after payment of outgoings) to apply the entire balance (inter alia) in reduction of large sums due for arrears of interest on incumbrances:*

Held, *that the proviso in s.* 48 (1) *was not applicable, and that the vendor was entitled to the "bonus" for his own use.*

The lands sold in this matter had been mortgaged by a deed of Dec. 10, 1873, to the Church Representative Body for £90,000, and

by a subsequent deed of May 12, 1876, to the Provident Life Office for £10,500. The annual rental exceeded by £521 the annual outgoings, but there were arrears of interest, amounting to over £8,500, due to the mortgagees. By a deed dated May 22, 1902, the vendor appointed a receiver over the estate, who was to collect the rents and apply same in payment of (1) rates and taxes; (2) 5 per cent. receiver fees; (3) certain costs; (4) interest due and to accrue due to the Church Representative Body; (5) interest due and to accrue due to the Provident Life Office; and (6) the surplus (if any) to the vendor. Under these circumstances the question now arose as to whether the bonus should not be added to the purchase-money under the proviso in s. 48 (1) of the Act of 1903, on the ground that the vendor was not entitled to receive any part of the rents and profits for his own use.

For convenience of sale the said lands had been divided into three parcels, each of which had been declared a separate estate, but as all these estates were subject to the same charges they were treated as one in the judgment, all parties having agreed that this should be done.

Campbell, K.C., *Conner*, K.C., and *A. M. Sullivan* for the vendor.

Jellett, K.C., and *Darley* for the incumbrancers.

LAND COMMISSION.

Feb., 1907.

WYLIE, J. (after stating the facts, and dealing with the meaning of the word "estate" in s. 48 (1), and referring to *Leonard's Estate*, IX. Quart. Land Rep. 177, and *Minhears' Estate*, IX. Quart. Land Rep. 183).—But then what is the meaning of "so incumbered that the vendor is not entitled to receive any portion of the rents and profits for his own use"? Does it mean at the time of the passing of the Act or at the time of sale? It cannot mean, I think, any later date, because no rents or profits of the lands sold are payable after the date of the agreements. But which of the other two dates is the time at which the title to receive is to be ascertained? Well, as the "bonus" is expressly given as an aid to the sale, it appears to me that the time of ascertainment must be the date of sale. But the greatest difficulty still remains. What is the meaning of "so incumbered that the vendor is not entitled to receive any part of the rent and profits"? Does it mean that at the date of the sale the yearly outgoings properly payable equal or exceed the yearly rents and profits, so that there is no annual surplus which the vendor is entitled to receive? And is that its only meaning? or, where such an annual surplus exists, would the existence at the date of sale of unpaid arrears of outgoings, sufficient to use up such surplus profit for one, two, ten, or twenty years to come, bring the case within the proviso? Suppose a vendor had an estate with a gross

rental of £1,000 a year, and annual outgoings of £700, leaving a net profit rent of £300 per annum, and suppose that for two years prior to the sale he had received all the rents and paid no outgoings, leaving £1,400 due for arrears of outgoings at the date of sale. Is that estate so incumbered that the vendor is not entitled to receive any part of the rents and profits for his own use? If so, would a like result follow if the arrears were only £400 instead of £1,400? If not so, in either case, would the result be different if, prior to the sale, a receiver had been appointed over the estate to receive all rents and pay all outgoings, both in arrear and accruing, and the surplus (if any) from year to year to the vendor? Now, the position of this estate at the passing of the Act and date of sale was this:—The gross rental of the estate was £5,655, the entire outgoings were £5,134, leaving an annual surplus profit rent of £521, or £238, if we deduct receiver's fees. If the case stopped there, there would, of course, be no question as to the vendor's right to the bonus. But it appears that by a deed of May 22, 1902, the Earl of Bandon appointed a receiver over the estate. [Refers to provisions of the receiver deed.] The receiver entered into receipt of the rents and applied them as provided. At the date of sale there was due to the Church Body over £6,712, and to the Provident Life Office £1,800, for arrears of interest. It is plain on the facts that neither on the passing

LAND COMMISSION.

Feb., 1907.

of the Act, nor at the date of sale, was the vendor entitled to receive any part of the rents and profits for his own use, nor would he, if the estate had been not sold, have been entitled to receive any for very many years to come. Does then the existence of these arrears of interest bring the case within the proviso? I was not referred to any case, nor have I been able to find any, except *Ely's Estate*, IX. Quarterly Land Rep. 22; [1904] 1 Ir. R. 66, that throws any light on this question. [Refers also to the subsequent application in the same estate, reported in [1905] 1 Ir. R. 413.] The expression used both by counsel and the Land Judge as indicating their view of the meaning of the words in the proviso that we are dealing with was "solvent as to income." This, it seems to me, expresses the only real and definite meaning that can be given to the clause. It cannot, I think, have been the intention of the Legislature that a vendor who was entitled to an estate perfectly solvent as to income should be deprived of the "bonus" because, at the date of the passing of the Act, at the date of sale, or at any other date, he happened to be deprived of the receipt of the net rents and profits by reason of a receiver being over the estate for a temporary purpose, or from some other temporary cause, and if this be so, I do not think I am at liberty to put any limit to the number of years that may elapse in any particular case before the net rents and profits can come

to the vendor's hands again. On considering the facts of the case as they existed at the date of the Act, or at the date of the sale, I am not satisfied that, if no sale had taken place, the vendor would not at some future time have received some part of the rents and profits of this estate, and, therefore, in my opinion, the proviso does not apply, and the vendor is entitled to the "bonus" for his own use.

Solicitor for the vendor: *Clifford Lloyd.*

Solicitors for the mortgagees: *Maunsell, Darley & Orpen.*

[*Note up on p.* 1108 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of the EDINBURGH LIFE ASSURANCE CO.

LAND COMMISSION.

Feb., 1907.

Feb. 27, 1907.—*Land Purchase Acts—Mining and mineral rights—Possession or enjoyment of vendor—Exclusion from sale—Irish Land Act,* 1903, *ss.* 13 (3*b*), 99 (*a*), (*b*).

Where, on the sale of an estate under the Irish Land Act, 1903, *it appeared that the mines and minerals were being developed by lessees of the vendors, and where the vendors had, after the lodgment of originating application, assigned their reversion in the minerals subject to the leases :*

Held, *that the mines and minerals were excluded from the sale under the provisions of s.* 99.

Questions submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The lands sold in this matter, which were situate in the County of Cork, had, by Landed Estates Court Conveyance dated July 30, 1897, been conveyed to the Edinburgh Life Assurance Company. Valuable mines under the said lands had been worked from time to time for eighty years back, and had produced a quantity of copper and lead ore. Owing to foreign competition and scarcity of coal for

smelting purposes the mines were closed in 1878. They were re-opened in 1887–8 for a short time, and since then prospecting for minerals had been carried on continuously. In 1899 Messrs. Norman Leigh and Arthur O. S. Cave obtained from the Edinburgh Life Assurance Co. a lease of all the mines and minerals under the company's lands and lands adjoining for 31 years, at a fixed rent of £100 per annum and a royalty of one-twentieth either in kind or of the net earnings derived from sales. By a further lease of 1902 the term of the said demise was extended for a period of 29 years, from May 1, 1930, at the like fixed rent, but the royalty to be reduced to one-fortieth. Prospecting was carried on by the lessees from June, 1899, with the object of resuming and extending the working of the mines. The Edinburgh Life Assurance Co., after the Act of 1903, entered into agreements for sale with most of their tenants, the mines and mineral rights being by the purchase agreements reserved to the company and their assignees. Since then the Edinburgh Life Assurance Co. had sold the mines and minerals to Sir Thomas Selby Tancred, subject to the above-mentioned leases, and had also sold the reversion in fee expectant on the determination of the said leases, and the conveyance thereof was executed on Dec. 11, 1906. It was the desire of Sir Thomas Selby Tancred to resume the working of the mines, and he having arranged with the said lessees of the mineral rights to acquire the benefit of the said leases,

LAND COMMISSION.

Feb., 1907.

and having acquired the ownership in fee of the minerals as aforesaid, was now taking steps to have a company formed under the Companies Acts for the purpose of working the mines already developed, and opening new mines. With the object of carrying this intention into effect certain capitalists had associated in a syndicate, preliminary to the formation of the intended mining company, and their advisers now required a judicial decision as to whether, under the circumstances, the mines and minerals were free from all claims by the Irish Land Commission or the occupying tenants of the lands, and that the title to the fee-simple of the mines and mining rights was not affected by the Land Purchase Acts and the Irish Land Act of 1903. Sir Thomas Selby Tancred had been advised that these rights were not so affected, but for the purpose of removing all doubts the Estates Commissioners had submitted questions to the following effect:—(1) Are the mines, minerals and mining rights on the said estate unaffected by the Irish Land Act, 1903, as "not being" under s. 99 (*a*) of the said Act "in the possession or enjoyment of the vendor at the time of sale?" (2) Do the said mines come within s. 99, (*b*) of the Irish Land Act, 1903, as being "worked" or "developed" by the vendor at the time of the sale, and remain unaffected by the said Act? (3) Do the said mining rights constitute a superior interest within the meaning of s. 13, (3*b*), of the Irish Land Act, 1903?

(4) Could the Land Commission under the circumstances reserve, under s. 13, the right of mining and taking minerals, or order the redemption of the same as a superior interest ?

Samuels, K.C., and *Gerald FitzGibbon* for Sir Thomas Selby Tancred.

Walker, K.C., for the vendors.

Authorities cited :—*Ranfurley's Estate*, [1906] 1 Ir. R. 169 ; *Lord Macnaghten's Estate*, IX. Quarterly Land Rep. 224, 38 Ir. L. T. R. 224.

WYLIE, J.—I have no doubt whatever that under s. 99 all mining and mineral rights were excluded from the sale, and remained in the vendors and their lessees, but I have still some doubt as to which of the two sub-sections (*a*) or (*b*) apply to the case. The case was put by Mr. FitzGibbon of an owner of mines giving a lease to a syndicate for the purpose of prospecting, with an option of a long term in the event of the prospecting being successful. I am inclined to think that in such cases the mines are being worked by the owner and not by the syndicate. That I would take to be the meaning of the words "worked" and "developed" by the owner of the mines and minerals. I think, under the circumstances, the right thing to do is to say that under s. 99 the mines and minerals are excluded from the sale, and that the contract of sale reserving them to the vendor is one which

LAND COMMISSION.

Feb., 1907.

the Land Commission can carry out. I will not, therefore, answer directly the first three questions. The answer to the fourth question will be in the negative.

Solicitors for the vendor: *J. & J. Galloway.*

Solicitors for Sir Thomas Selby Tancred: *Stanuell & Son.*

[*Note up on pp.* 1070 *and* 1156 *of Cherry and Maxwell's Irish Land Acts,* 1903–1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of THOMAS TAYLOR.

March 15, 1907.—*Land Purchase Acts—Practice—Head rent—Redemption—Consent to price by trustees—Objection to price by tenant-for-life—Redemption price fixed by the Court.*

Where, in the case of an estate sold under the Irish Land Act, 1903, *the trustees of a settlement with a future power of sale had signed a consent to the redemption, at a certain price, of an apportioned part of a head rent charged upon the lands sold, which said rent was part of the hereditaments comprised in the said settlement, and the tenant-for-life objected on the ground that the price agreed upon was too small.*

The Court ascertained the value, and fixed the redemption price in the ordinary way without regard to the consent.

The estate sold in this matter was, with other lands, subject to a head rent of £30 12s. Irish currency, reserved by lease, dated Feb. 23, 1784, of which £16 18s. 2d. had been apportioned on the estate. The said rent was subject to the trusts of a settlement, dated Aug. 12, 1868, under the provisions of which William John

LAND COMMISSION.

March, 1907.

Keegan was tenant-for-life, and by which it was agreed and declared that the trustees "should stand possessed of, and interested in, all and singular such trust estate, moneys, stocks, funds, and premises, and all dividends and annual product thereof, upon trust that they the said trustees do and shall, as and when the said trustees shall see fit so to do, absolutely sell and dispose of the said freehold, hereditaments, and all and singular other the trusts estate as shall consist of money, by public auction or by private contract, or partly by one and partly by the other mode, and at such time and in such manner as they shall see fit, at and for the best price and prices that can be reasonably obtained for the same, and do and shall assign the said freehold estate, or other the trust estate, when sold unto the purchaser or purchasers thereof, as he or they shall direct or appoint."

The trustees of the said settlement had signed a consent that the said apportioned part of the said rent should be redeemed at £422 14s. 2d.; but when the final schedule came before the Examiner he made a note on the schedule to the effect that the trustees had no present power of sale, and could not agree to a sale.

Corvan for the vendor.—The trustees of the settlement had power to consent to the price at which that portion of the annuity which has been apportioned on the lands sold should be redeemed without the consent of the tenant-for-

life, and they have signed a written consent to the price. He cited Settled Land Act, 1890, s. 16.

H. Hunt for the tenant-for-life of the annuity.—The tenant-for-life of the head-rent is the proper person to agree to the redemption price. The price agreed on is inadequate, as the security is ample, and the annuity is payable prior to tithe rent-charge.

WYLIE, J., fixed the redemption price at £455.

Solicitor for the vendor: *Justin M'Carthy.*

Solicitor for Wm. John Keegan: *M. Green Foley.*

[*Note up on p.* 1131 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

CIRCUIT CASE.

(Before LORD O'BRIEN, L.C.J.)

WOLFE'S ESTATE (No. 2).

THE RECEIVER AND ANOTHER *v.* WHITE.

CIRCUIT CASE.

March, 1907.

Cork, March 23, 1907—*Land Purchase Acts—Rent – Interest—Purchase agreement—Not more than one year's rent—S.* 57 *of Act of* 1903.

Where the Land Judge accepts an offer of the tenant, and the tenant agrees to pay interest on the amount of the advance for the twelve months preceding the acceptance of the offer, such interest can be recovered under s. 57 (4) *of the Act of* 1903, *as being not more than "one year's arrears of rent," after the acceptance of the offer of the Land Judge and after the tenant has obtained his vesting order.*

This estate was sold to the tenants by the Land Judge under the Irish Land Act, 1903, the 40th section of the Act of 1896 not being employed. The tenants made a proposal to purchase on Form 34A. The proposal of Michael White, the defendant, being dated the 13th March, 1905. On the 19th December, 1905, the Land Judge accepted this proposal, and, by an order upon this date, it was ordered that the Receiver be at liberty to accept from the tenants interest

from November 1904, on their respective purchase-moneys to the date of completion of the sale at the rate of 3½ per cent. per annum. The order then provided that the interest payable to and recoverable by the Irish Land Commission under the provisions of s. 57 of the Act of 1903 should be calculated at the rate of 3¼ per cent., and that the portion of this interest not liable to be applied under the provisions of s. 20 of the Act of 1887 should be lodged to the account of the Accountant-General. The amount of the advance was £959, and one year's interest thereon, from the 1st Nov., 1904, to the 1st Nov., 1905, was £33 11s. 3d. The amount of rent for the same time would have been £45 13s. 6d. if the defendant had not purchased his holding. The tenant only paid half of the amount due for interest, and proceedings were taken at the October Quarter Sessions, 1906, to recover the balance—viz., £16 15s. 7½d. In February, 1906, the defendant White obtained his vesting order. The Land Judge and the Receiver were joined as plaintiffs in the Civil Bill to recover the above amount. The defendant had regularly paid the annuity due to the Land Commission, and only disputed his liability to pay the interest which had accrued due between November, 1904, and November, 1905, prior to the date of the order of the Land Judge of the 19th December, 1905.

The County Court Judge gave a decree for the amount claimed.

CIRCUIT CASE.

March, 1907.

H. D. Conner, K.C. (with him *Joseph Sullivan*), for the plaintiffs.—Section 35 of the Act of 1896 has been modified by s. 57 of the Act of 1903. Section 57 (4) enables, where an offer of the Land Judge is accepted, not more than one year's arrears of rent to be recovered. Less than this amount is claimed, and it is therefore recoverable.

M. J. Bourke, K.C. (with him *George M'Sweeney*), for the defendant.—As this liability accrued before the acceptance of the offer of the Land Judge upon the 19th December, 1905, it is irrecoverable. The sum claimed could only be recovered if it had been added to the advance and been included in the purchase annuity.

LORD O'BRIEN, L.C.J., affirmed the County Court Judge, and gave a decree for the amount claimed and costs.

Solicitor for the plaintiffs: *R. W. Sherlock.*

Solicitor for the defendant: *P. J. Collins.*

[*Note up on p.* 1124 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

CIRCUIT CASE.

(Before GIBSON, J.)

IRISH LAND COMMISSION AND LORD LISTOWEL *v.* M'AULIFFE.

CIRCUIT CASE.

July, 1907.

Dublin, July 26, 1907.—*Land purchase—Interest—Recovery of—Invalid agreement—Whole sum not to be advanced—Purchase price.*

A tenant agreed to purchase from his landlord his holding for the sum of £879, "*in case an estate of which the said holding forms a part shall be sold under the provisions of the Irish Land Act,* 1903." *The tenant agreed to apply to the Land Commission for an advance of that sum, to be repaid by a purchase annuity, and he agreed to pay interest at the rate of* £3 10*s. per cent. from the date of the agreement to the date of the advance. It was verbally agreed between the landlord and the tenant that* £50 *out of the purchase-money should be returned to the tenant for the purpose of building a hay-shed on the holding. The Land Commission declined to advance more than* £829, *and sued the tenant for the interest payable on that sum:*

Held (*affirming the County Court Judge*), *that interest could be recovered under s.* 35 *of the Land Act,* 1896, *neither in respect of* £879 *nor of* £829.

CIRCUIT CASE.

July, 1907.

Appeal from a dismiss by the County Court Judge of Kerry. The facts are fully set out in the judgment of Shaw, C.C.J.

JUDGE SHAW.—This is one of a number of cases in which the Irish Land Commission have sued tenants on Lord Listowel's estate for interest payable on the purchase-money under agreements for purchase under the Land Act of 1903. The tenants in this and the other cases refuse to pay the interest claimed, on the ground that the agreements under which the interest is claimed are void. Daniel M'Auliffe, the defendant, on June 1, 1904, entered into an agreement with Lord Listowel for the purchase of his holding for the sum of £879. This agreement was to be carried out through the Land Commission under the Irish Land Act, 1903, and was embodied in the form prescribed by the rules of the Land Commission for such agreements. The first paragraph of this agreement is in these words:—"In case an estate of which the said holding forms a part shall be sold under the provisions of the Irish Land Act, 1903, the vendors hereby agree to sell and the tenant hereby agrees to purchase the said holding for the sum of £879." The third paragraph of the agreement is as follows:—"The tenant hereby applies to the Irish Land Commission for an advance of the sum of £879 for the purpose of such purchase, to be paid by an annuity of £28 11s. 4d., payable as by the Irish Land Act, 1903, provided." Paragraph 8 provides:—"Interest on the purchase-money shall be payable to the Irish Land Commission at the rate of £3 10s. per cent. per annum from the date of this agreement up to the date of the advance," and it is for interest payable to the plaintiffs under this paragraph 8 that the present action is brought. At the time of this agreement for purchase it was verbally agreed between the landlord and tenant that £50 out of the purchase-money should be returned to the tenant

by the landlord for the purpose of building a hay-shed on the holding. The Land Commission decided that this £50 could not be advanced as part of the purchase-money, and, accordingly, refused to advance the whole sum of £879, but offered to advance the sum of £829 as purchase-money if it were applied for. No application has ever been made for the advance of this smaller sum, and no new agreement has ever been entered into for purchase of the holding at this smaller sum. The question I have to decide is whether, under these circumstances, the Irish Land Commission can recover from the defendant interest payable under the agreement of June 1, 1904. It was suggested on the part of the defendants that this agreement in itself, and altogether apart from any subsequent event, was void, on the ground that paragraph 1 of the agreement made it conditional upon an event—viz., the sale of the estate under the provisions of the Land Act of 1903, which was undefined in point of time, and might, therefore, transgress the rule against perpetuities. This argument was founded upon certain hints or suggestions which were thrown out by some members of the Court of Appeal in the case of *Talbot Crosbie's Estate*, [1905] 1 Ir. 570. This question as to the validity of the form of the agreement was argued before Wylie J. in a case reported in the May number of the *Irish Law Reports* (*Doyle's Estate*, [1907] 1 Ir. 204, see p. 156, *ante*). The judgment in that case is binding upon me, and it affirms, upon what appears to me to be good grounds, the validity of this form of agreement as against the objection to which I have referred. But a more serious objection to the validity of this agreement arises out of the refusal of the Land Commission to sanction the advance of the sum asked for as purchase-money of the holding. It is admitted by the solicitor for the Irish Land Commission that they cannot recover interest on the whole sum of £879, but only on the smaller sum of £829, and, accordingly, he is willing

CIRCUIT CASE.

July, 1907.

to take a decree for whatever sum shall be ascertained as interest at 3½ per cent. upon £829 after allowing for the sums overpaid on previous gales. But the defendant refuses to pay any interest at all, on the ground that the refusal of the Land Commission to make the advance asked for puts an end to the agreement altogether. It has been argued that the agreement for purchase and the application to the Land Commission for the purchase-money, though both embodied in the same document, are two independent transactions, and that, though the Land Commission have refused the advance, that does not affect the validity of the purchase. I cannot take this view. The agreement to purchase is conditional upon the estate being sold under the provisions of the Land Act, 1903, and one of the essential provisions of that Act is the advance of the purchase-money by the Land Commission. All these sales are conditional upon the advance of the purchase-money, and have no validity whatever if that advance is refused. "In the case of a direct sale," as Mr. Justice Wylie says in his judgment already referred to, "it is an essential condition to carry out the agreement that an application should be made for an advance of the purchase-money, and that the Estates Commissioners should sanction such advance." This interest now sued for is interest payable under s. 35 of the Land Law (Ireland) Act, 1896, and that section distinctly enacts—"but if the advance is refused the agreement shall be void, and the tenant shall be liable to pay rent and arrears as if the agreement had not been made." It does not appear to me that it makes any difference whether the Land Commission refuses to advance any money at all, or refuses to advance the whole of the sum applied for. In the present case, if the agreement for purchase at the sum of £879 stood good, although a sum of only £829 was advanced, it would follow that the tenant must pay the balance of £50 out of his own pocket. It could not be contended for a moment that this was the agreement entered into be-

tween the parties. Or take the view of the Irish Land Commission that the agreement stands good, only that the purchase-money is now £829 instead of £879. What evidence is there of such an agreement at all? The tenant has not applied for an advance of £829, nor has he agreed to do so, and I cannot make a new agreement for the parties. I have come to the clear conclusion that this agreement was conditional upon the advance of the full sum of £879 by the Land Commission, that their refusal to advance the whole of that sum put an end to the agreement, and that they cannot now recover interest upon any sum whatever under this agreement, and I must, therefore, dismiss this and all the other cases in which interest is sought to be recovered under similar circumstances.

M. J. Bourke, K.C., and *M'Elligott* for Lord Listowel (the appellant).

P. D. Fleming, K.C., and *B. Roche* for the tenant (respondent).

GIBSON, J.—This was an appeal from a dismiss in an action for interest under a purchase agreement dated June 1, 1904, made between Lord Listowel and the defendant, as tenant on the estate, for the sum of £879. This agreement was duly lodged with the Land Commission. Thirteen other cases in the appeal list depend upon, and are governed by, the same point. The landlord's agent, Mr. Crosbie, having been informed of certain correspondence between the valuator for the landlord in *Julian's Estate* and the Commissioners, thought that he was entitled to make the arrangement hereinafter stated. He acted in good faith, and without any idea that

CIRCUIT CASE.

July, 1907.

the transaction was unlawful or improper. There is some difference between him and the tenant as to the object of the advance of the £50 to the tenant. I accept Mr. Crosbie's version. The defendant's admitted object in defending the present action is not to obtain a £50 reduction of the purchase-money (which the landlord is willing to grant), but to get out of the purchase agreement altogether, which he now believes to be disadvantageous. As a term of the bargain between the landlord and tenant (not stated in the signed contract) it was originally agreed that on completion of the sale £50 should be paid to the tenant to provide a hay-shed; that any interest paid on that sum meantime should be refunded. and that if any bonus was paid on the said £50 portion of the purchase-money, that portion of the bonus should be paid to the tenant. The landlord having discovered that (as decided in *Crosbie's Estate, ante* p. 1; 40 Ir. L. T. R. 256; [1906] 1 Ir. R. 515), this £50 could not be advanced, offered to advance the £50 at once to the tenant, without interest, the loan to be repayable by instalments, and to strike £50 out of the purchase agreement. The tenant refused to accept this modification or to sign any new purchase agreement for £829. The landlord's proposal, it will be observed, omits the tenant's share of the bonus. Before Judge Shaw it was argued (*inter alia*) that the purchase agreement was invalid as transgressing the rule against perpetuities. This contention was not presented before me, and I think

it is unsustainable. The argument for the plaintiff is based on two points: the first is that the Land Commission has not, within the meaning of s. 35 of the Act of 1896, refused the advance, and that no decision of the Commissioners has been signified as provided by r. 38 (Cherry, p. 1172), and that the contract, therefore, at present binds the tenant.

I cannot assent to this argument. Section 35 makes a valid agreement void if the advance is refused, but it does not make an invalid agreement valid up to the date of such refusal. The Commissioners are bound by the decision in *Crosbie's Case*, and must refuse the advance. They have invited (by letter dated July 3, 1907) the signature of a new purchase agreement. The action was originally in the name of the Land Commission only. They have not appealed, and must be taken to accept the decision as law. Lord Listowel's name was added by amendment to enable him to appeal. Assuming that such an amendment gives him a *locus standi* to appeal, I think that the tenant cannot be called on to pay the interest, if not legally liable, merely because there has been no formal refusal to advance, authenticated in the manner provided by the Commissioner's administrative rules. The second point argued is that the tenant must pay interest on at least the £829. This is a point of more difficulty, and I have considered it with care. I have come to the conclusion that, under the purchase contract in its present

CIRCUIT CASE.

July, 1907.

form, there is no such right of action. The £50 is part of the consideration, and the Court cannot alter the contract in an action by the defendant. The difficulty has been caused by making the signed contract dependent on an unlawful term or condition. Whether, in specific performance, the Court might possess larger powers, and might reduce the purchase-money, is not a matter which now requires decision. I do not suggest that it would have such power. I must, therefore, affirm the decision below. I express no opinion whether (the Land Commission not having appealed) it is competent for Lord Listowel to maintain this appeal, if the Land Commission can, and must, sue on the contract. For the purpose of the case I have assumed that he is a competent appellant.

Solicitors: *C. F. Downing* and *John Moran.*

[*Note up on p.* 575 *of Cherry's Irish Land Acts, 3rd Edition,* 1903; *and on p.* 1172 *of Cherry and Maxwell's Irish Land Acts,* 1903-1904.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of MAJOR F. G. HOLMES.

LAND COMMISSION.

July, 1907.

July 15, 1907.—*Land Purchase Acts—Irish Land Act*, 1903—*Sections* 15 (2), 48—*Intervening interests—Bonus—Calculation of.*

The percentage payable to vendors of estates under s. 48 *of the Irish Land Act*, 1903, *is properly calculated at* 12 *per cent. on the entire purchase-money, without any deduction in respect of sums applicable to the redemption of intervening interests.*

Question arising on the allocation of the final schedule. The entire purchase-money of the lands sold was £10,815, and the amount of the percentage payable under s. 48 of the Irish Land Act, 1903, calculated at 12 per cent. upon that sum, was £1,297 16s. It appeared, however, from the schedule that the sum of £43 was payable out of the purchase-money to Mr. E. M. Blacker as the redemption price of an intervening interest owned by him in respect of one of the holdings comprised in the estate. Under these circumstances a question arose as to whether the percentage should be calculated on the entire

LAND COMMISSION.

July, 1907.

purchase-money, or whether the sum of £43 should have been first deducted.

Darley for the vendor.—The question has not been decided, and a doubt arises owing to the practice of averring in the affidavit that there are no intervening interests. Section 15 (2) of the Irish Land Act, 1903, expressly provides that the redemption price is to be dealt with as if it were the redemption price of a superior interest. *Ryan's Estate*, X. Quarterly Land Rep. 172, is the nearest case to the present, but is not an authority on the precise point.

WYLIE, J.—I do not think that case affects the question. The redemption price of intervening interests is to be paid out of the purchase-money of the estate under s. 15 (2), and the percentage under s. 48 is calculated on the purchase-money.

Solicitors for the vendor: *Maunsell, Darley & Orpen.*

[*Note up on pp.* 1070 *and* 1103 *of Cherry and Maxwell's Irish Land Acts*, 1903–1904.]

IRISH LAND REPORTS.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

(Before Ross, J.)

BOLAND'S ESTATE.

CHANCERY.

Nov., 1906.

Nov. 27, 1906.—*Land Purchase Acts—Head rent—Redemption of—Indemnified lands—Exclusive charge upon other lands—S.* 62 (3) *of the Act of* 1903.

Sub-section 3 *of s.* 62 *of the Land Act of* 1903 *in providing that where "the land sold is entitled to be indemnified against any claim in respect of a superior interest by other lands, and the other lands are a sufficient security therefor, the Court may . . . exclusively charge the whole of the superior interest upon other lands," only deals with the case where "the land sold" and "the other lands" are subject to the same superior interest as regards the rights and remedies of the owner of the superior interest. Consequently a vendor who sells to the tenants under the Act of* 1903 *cannot obtain an order exonerating the lands he has sold from a head-rent, and have it exclusively charged both upon the unsold lands out of which it issued, and also upon lands which were not subject to it as regards the owner of the superior interest, although*

CHANCERY.
Nov., 1906.

the security afforded by the combined lands proposed to be exclusively charged was sufficient.

This was an application to redeem a head rent, consequent upon the sale of part of the lands of Robertshill, in the County of Kilkenny, to the tenants under the Irish Land Act, 1903. By an indenture of fee-farm grant, August 27, 1863, made between William Hanford Flood of the one part and Isabella Savage of the other part, the lands of Robertshill, consisting of 44 acres, were granted to Isabella Savage, subject to a fee-farm rent of £24. The interest of William Hanford Flood was now vested in Colonel John Compton Hanford. The interest of Isabella Savage subsequently became vested in Sir Henry Meredyth. Sir Henry Meredyth was also the owner of a large number of other lands in the County of Kilkenny, including the lands of Palmerstown, consisting of 199 acres. By indenture of August 2, 1901, Sir Henry Meredyth conveyed 26 acres of Robertshill to Patrick Boland and John P. Boland, subject to the annual fee-farm rent of £24. But these 26 acres of Robertshill were indemnified from payment of this fee-farm rent by the residue of the lands of Robertshill retained by Sir Henry Meredyth, and also by the lands of Palmerstown, consisting of 199 acres, which he also retained. Patrick Boland and John P. Boland afterwards sold this 26 acres of Robertshill to the tenants under the Act of 1903. An application was now made,

under s. 62 of the Act of 1903, seeking to have the fee-farm rent of £24 exclusively charged upon the portion of the lands of Robertshill retained by Sir Henry Meredyth, and also upon his lands of Palmerstown. The sole question discussed was whether there was jurisdiction under s. 62 of the Land Act of 1903 to exclusively charge the head rent upon the unsold portion of Robertshill and the lands of Palmerstown, as it was unnecessary to consider whether these lands afforded sufficient security until the point of jurisdiction was decided and it was accordingly assumed it was sufficient. There was also an application to redeem a head rent of £20, payable by Sir Henry Meredyth to Charles R. Tennant, out of the lands of Kilcreen. These lands had also been sold by Sir Henry Meredyth to Patrick Boland and John P. Boland subject to this head rent, but indemnified against its payment by other unsold lands of Sir Henry Meredyth. An order was also sought exclusively charging this head rent of £20 upon the other unsold lands.

Philip A. O'C. White, for the vendors, Patrick Boland and John P. Boland.—An order can be made under s. 62 (3) of the Land Act of 1903 exclusively charging the unsold lands of Sir Henry Meredyth with the head rents. The only question is whether "the other lands are a sufficient security." The words "other lands" are very wide and general, and it is not necessary that the head rent should issue out of the entire of the sold and unsold lands comprised in the fee-farm grant.

CHANCERY.
Nov, 1906.

C. A. O'Connor, K.C., for the owner of the head rent of £24, Colonel Hanford.—It is impossible to know whether the lands of Palmerstown are a sufficient security for the head rent, as the owner of the head rent of Robertshill knows nothing of the title to these lands. He has rights of ejectment and distress to enforce payment of the head rent as against the lands of Robertshill, but he has no rights against Palmerstown, as he is a stranger to the deed of August 2, 1901. The head rent can only be exclusively charged upon lands which were formerly subject to it.

Hewitt Poole, for Charles R. Tenant, the owner of the head rent of £20, supported this argument.

ROSS, J.—I think I can decide the case before me without giving notice to Sir Henry Meredyth In my opinion sub-ss. 1, 2 and 3 of s. 62 of the Land Act of 1903 are all applicable to the same general case, where there is a superior interest issuing out of different lots of land, and it is to a case of this kind the section applies. Sub-s. 1 applies where the Court is satisfied that for a period of not less than twenty years prior to the sale no payment has been made in respect of that interest by the owner of the land sold, and that the other lands subject thereto are a sufficient security therefor, the purchase-money of such land may be distributed without regard thereto. Sub-s. 2 deals with a case where a portion of the superior interest for the same period of time has been paid by the owner of

the sold lands, and the other lands are a security therefor, the purchase-money can be distributed as the section prescribes. Sub-s. 3 deals with a like case, where the sold land is entitled to be indemnified against a superior interest by other lands. "Other lands" in this sub-s. (3) means the other lands subject to the same superior interest, and when these other lands are sufficient security within the meaning of the sub-section the Court may, upon such terms and in such manner as appears "equitable," exclusively charge the whole of the superior interest upon these other lands. But it is a monstrous proposition to say that "other lands" may mean other lands situate in any part of Ireland which have been made, merely by contract, subject to a superior interest, a contract which the owner of the superior interest was wholly unaware of. It cannot be held that the owner of the superior interest is to take as security for his head rent other lands of which he knows nothing as to either their title or the security that they afford. The motion to redeem these two head rents must be refused with costs.

Solicitor for the vendors: *Joseph Tierney.*

Solicitor for Col. Hanford: *J. E. MacDermott.*

Solicitors for Charles R. Tennant: *S. S. & E. Reeves & Son.*

[*Note up on p.* 1129 *of Cherry's Irish Land Act*, 1903.]

CHANCERY DIVISION—LAND JUDGES.

(Before MADDEN, J.)

In the Matter of the LOCAL REGISTRATION OF TITLE (IR.) ACT, 1891, and FREEMAN, a Registered Owner of Land.

LAND JUDGES.

June, 1907.

June 17, 29, 1907.—*Land Purchase Acts—Irish Land Act*, 1903, *ss.* 3, 54—*Demesne lands repurchased by the owner—Holding—Restriction on power to charge or mortgage.*

The restriction contained in s. 54 *of the Irish Land Act*, 1903, *on the power of mortgaging or charging a holding, for the purchase of which the Land Commission have made an advance, does not apply to demesne lands repurchased by the owner from the Land Commission.*

This was an application on behalf of the Hibernian Bank, pursuant to an order of the Registrar of Titles, under the Local Registration Title (Ir.) Act, 1891, s. 14 (2), for the decision of the Court on a question of law. The facts were as follows:—Michael Freeman, being the owner of an estate, by an undertaking dated Nov. 3, 1905, undertook to repurchase his demesne from the Land Commission under the provisions of s. 3 of the Irish Land Act, 1903,

and by a vesting order dated July 26, 1906, the Land Commission vested the demesne in him, subject to the repayment of an advance of £4,754 by an annuity of £154 10s. 2d. By a deed dated July 7, 1906, he charged the lands with a life annuity of £30 in favour of Margaret Farrelly. By a deed dated March 22, 1907, he mortgaged the lands to the Hibernian Bank to secure £5,000 and interest. Freeman was, by an order dated May 10, 1907, adjudged a bankrupt. It was admitted that the total capital value of the annuity in favour of Margaret Farrelly and the mortgage greatly exceeded ten times the purchase annuity. It was contended by the bank that the restrictions contained in s. 54 (3) of the Irish Land Act, 1903, were not applicable to this case. The question of law for the decision of the Court was as follows:—"Whether s. 54 of the Irish Land Act, 1903, applies to lands repurchased by an owner under s. 3 of the said Act."

Herbert Wilson, K.C., for the Hibernian Bank.—Section 54 of the Irish Land Act, 1903, does not apply to demesne lands. Demesne lands are not a "holding." All the Land Acts must be read *in pari materia:* Land Law (Ir.) Act, 1881, s. 57 (definition of "holding"); Land Law (Ir.) Act, 1887, s. 8 (11); Irish Land Act, 1903, s. 3.

S. L. Brown, K.C., for the assignees in bankruptcy of Freeman.—The intention of s. 54 of the Irish Land Act, 1903, is to give the Land Commission a better security for their charge

LAND JUDGES.

June, 1907.

than they otherwise would have. Section 3 of the Act only applies while instalments are due to the Land Commission. When s. 54 comes into operation there has long ceased to be any "holding," and therefore in that section the word cannot have the meaning given it in Land Law (Ir.) Act, 1881, s. 57. There never has been a "tenancy" in demesne lands. In s. 54 the word "holding" must have a meaning only applicable to it in the section itself—namely, "a parcel of land purchased under the Act."

Cur. adv. vult.

Judgment was delivered on June 29, 1907.

MADDEN, J.—This case is of great importance. The policy of the Irish Land Act, 1903, was to enable occupying tenants to become purchasers of their holdings, and a provision was grafted on the main policy of the Act whereby the owner might remain in possession of the untenanted portion of his estate. The question in the present case is, whether the provisions of s. 54 of the Irish Land Act, 1903, apply as between the Land Commission and the owner of demesne land. The whole of s. 54 assumes that the holding is to be registered under the compulsory provisions of the Local Registration of Title Act, while s. 3 (6) exempts lands repurchased under s. 3 from the provisions of the Local Registration of Title (Ir.) Act, 1891, relating to the devolution of freehold registered land. There is, moreover, a wide distinction between a "holding" and

untenanted land. The question of law must therefore be answered in the negative.

Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*

Solicitor for Freeman's assignees in bankruptcy: *James J. Lynch.*

[*Note up on pp.* 1058 *and* 1121 *of Cherry's Irish Land Act*, 1903.]

LAND COMMISSION.

(Before MEREDITH, J.)

In the Matter of the Estate of COLONEL C. W. WARDEN.

LAND COMMISSION.

April, 1906.

April 20, 1906.—*Irish Land Act*, 1903—*Congested estate—Purchase of by Land Commission —Prospect of loss on re-sale—S.* 6 (4)—*S.* 44—*Expenditure necessary for improvements—Reserve Fund—Recoupment of—S.* 43—*Enhanced price.*

An estate which was being sold to the Land Commission under s. 6 *of the Irish Land Act was a congested estate within the meaning of that section, and the Estates Commissioners* (a) *considered that it was an estate on which a considerable expenditure from the Reserve Fund was necessary and expedient;* (b) *proposed to certify to the Lord Lieutenant that the purchase and re-sale of the estate was desirable in view of the wants and circumstances of the tenants, and to ask the Lord Lieutenant that a loss on re-sale not exceeding* 10 *per cent. might be incurred, and* (c) *proposed if the Lord Lieutenant should so determine to offer to the vendor a sum of* £34,133 *for the estate. On questions arising as to the repayment to the Reserve Fund under s.* 43 *of*

such sums as might be expended on the improvement of the estate :

Held (1)—*That there is a statutory duty imposed upon the Treasury to provide, by regulations for the advance by the National Debt Commissioners to the Land Commission, for repayment to the Reserve Fund of such sums as represent increase of price consequent on improvements when such circumstances exist as are contemplated in the statute, and a statutory duty on the National Debt Commissioners to advance such sums.* (2) *That s.* 43 *applies to congested estates brought under the provisions of s.* 6 (4). (3) *That "the increase of price consequent on improvements" in s.* 43 (3) *refers to parcels of land, and is represented by the difference between the prices which would have been obtained for parcels in their unimproved state and the prices actually obtained for the parcels after the improvements have been effected ; and* (4) *that, accordingly, in the present case any sums expended out of the Reserve Fund on the improvement of parcels of the estate should, in the event of the sale of such parcels resulting in an enhanced price, be recouped in the manner provided for by s.* 43 (2) *and* (3) *to the extent represented by the increase of the price consequent on such improvement.*

Questions submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The owner had, in the first instance, entered into agreements for the sale of the estate direct to the tenants for sums amounting to

LAND COMMISSION.

April, 1906.

£34,133, but, with his consent, the sale of the estate was afterwards being proceeded with under s. 6 of the Irish Land Act, 1903. The estate was a congested estate, and the minute of the Estates Commissioners stated that a considerable expenditure from the Reserve Fund was expedient and necessary. The Estates Commissioners proposed to certify to the Lord Lieutenant that the purchase and re-sale of the estate were desirable, and to ask him to determine that a loss might be incurred on the re-sale of the estate within the limits permissible under s. 44 of the Act, and, if the Lord Lieutenant should so determine, they proposed to offer the vendor the sum of £34,133 for the estate. The minute further stated as follows :—If nothing is expended for the benefit or improvement of the estate from the Reserve Fund, and there is a loss on the re-sale of the estate, the Commissioners assume that such loss, within the limits determined by the Lord Lieutenant, and permissible under s. 44 of the Act, will be credited to the Land Purchase Fund as part of the expenses of the Land Commission, as provided by s. 44 (2). The Commissioners, however, before making an offer for the estate, referred to the following questions :—Assuming that the sum of £34,133 is paid to the owner of the estate, and that the Lord Lieutenant determines that a loss of 10 per cent.—*i.e.*, £3,103—may be incurred in the re-sale of the estate so that the estate may be re-sold for £31,030. (1) If the

Commissioners expend from the Reserve Fund for the benefit or improvement of the estate a sum of £3,103, and having improved the estate by this expenditure sell parcels of the estate, enhanced in value by such expenditure to the extent of at least £3,103, to tenants or other persons at £34,133, the sum paid to the vendor, will the sum of £3,103 thus expended be repaid to the Reserve Fund pursuant to s. 43 (2)? (2) If the Commissioners expend from the Reserve Fund for the benefit or improvement of the estate a sum of £6,000, and, having improved the estate by this expenditure, sell parcels of the estate, enhanced in value by such expenditure to the extent of at least £6,000, to tenants or other persons at £37,030, will the sum of £6,000 thus expended be repaid to the Reserve Fund pursuant to s. 43 (2)? Or, in case 1, will there be no re-payment to the Reserve Fund? and in case 2, will the repayment to the Reserve Fund be limited to the excess of the said sum of £37,030 over the sum of £34,133 paid to the vendor?—*i.e.*, £2,897. Rule 12 of the Treasury Rules and Regulations of April 14, 1905, provided that the measure of the amounts repayable to the Reserve Fund under s. 43 (3) should be the excess (up to the limit of the amount expended on improvements) of the sums for which the estates are resold over *the sums paid to the vendors*, as appearing by accounts to be prepared by the Land Commission for each estate when resold.

LAND COMMISSION.

April, 1906.

Attorney-General, *Solicitor-General* and *Coll* for the Treasury.

Matheson, K.C., for the vendor.

MEREDITH, J.—The course adopted by counsel for the Treasury to-day, of withdrawing any technical objection, and thus enabling the Court, after full discussion, to pronounce a decision as to the true construction of the Act of Parliament, commends itself to my mind. The full discussion that has taken place to-day has revealed a number of points that have hitherto escaped the notice of the most diligent students of the Irish Land Act, 1903, in which class I may include myself. The point raised on behalf of the Treasury—that the Lords of the Treasury are masters of the situation under s. 43 (3)—is one of great importance; one which, if I were to adopt the view presented by the Law Officers, would render the question of recoupment of advances made out of the Reserve Fund a matter of very great doubt and difficulty. If, as has been argued, the Act of Parliament has given no *right of recoupment* to the Land Commission under any circumstances, if it has merely entrusted the Treasury with *power to authorise recoupment*, then the whole edifice erected by the Estates Commissioners in their minute falls to the ground. But I do not think that Parliament has left it in the sole discretion of the Treasury to give or withhold, by regulations, the benefit of recoupment referred to in s. 43. I am

of opinion that, on the true construction of the statute, the words of the section impose a duty and an obligation on the Treasury, which they are bound to fulfil. Sub.-s. 3 provides that "Regulations made by the Treasury *may* provide that where the Land Commission have expended money on the improvement of an estate, and, in consequence, have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners *may* advance to the Land Commission, for repayment to the Reserve Fund, such sums as represent the increase of price consequent on the improvements." The word "may" occurs twice in the sub-section. If it is to be said that the word "may" in the first clause means "may if they please," it must bear the same meaning in the subsequent clause, "the National Debt Commissioners *may* advance to the Land Commission for repayment to the Reserve Fund." Are the Land Commission, for the second time, to be left at the mercy of an outside body by an unreserved discretion being given to the National Debt Commissioners to act or not to act on regulations made by the Treasury? I think that the word "may" has the same meaning in both clauses. The Legislature has imposed a duty on the Treasury to provide, by regulation, for recoupment in the circumstances contemplated by the statute where such circumstances actually exist, and I think that in like manner an obligation is imposed

LAND COMMISSION.

April, 1906.

on the National Debt Commissioners (where the statutory circumstances exist) to advance to the Land Commission, for repayment to the Reserve Fund, such sums as represent the increase of price consequent on the improvements. I need not refer to my judgment in the *King-Harman Estate*, 38 Ir. L. T. R. 102. In itself it would be of small authority, but it is based on a series of decisions which have so cleared the air that it appears now to be almost impossible to mistake the meaning of the word "may" in any section of an Act of Parliament. If further argument were required in the present case I might point out that sub-s. 1 of s. 43 provides that the Treasury may, on the request of the Land Commission, direct the advance, out of the Reserve Fund established under paragraph (b) of sub-s. 2 of s. 5 of the Act of 1891, of such sums as the Land Commission may certify to be required for the benefit or improvement by them of estates and untenanted land. The Solicitor-General summarised his argument in a question. According to the custom of the country I respond with a question, and I ask the learned counsel could it be held that, when the Land Commission certify that a sum is required for the benefit or improvement by them of an estate or untenanted land, the Treasury could say "we are masters of the situation," and refuse to advance the amount required by the Land Commission? I, therefore, hold that if the

regulations framed by the Treasury are contrary to the statute, or are inadequate to meet the requirements of the statute, they ought to be amended. I take it that, if my view is acquiesced in, the Treasury will not place any obstacle in the way of such amendment. I now come to the question whether the Treasury have taken the true view of ss. 43 and 44 of the Act of 1903. I would have much preferred that the duty of determining the true construction of these sections had fallen to some other tribunal. It is certainly a case which, if I had at the first realised its importance, I would have sent elsewhere for determination. I must now decide myself what is the true intention of the Legislature as expressed in the sections I have referred to. The opinion I have formed, after the very full discussion that has taken place, is that the Treasury take much too narrow a view of the construction of these sections. They are actuated solely by the motive of seeing that the law is carried out in its integrity, but in point of fact the contest comes to this:—That the Treasury consider that, in the circumstances set forth in the minute of the Estates Commissioners, the loss on the re-sale of the Warden Estate, and on congested estates similarly situated, must be borne by the Reserve Fund without hope of recoupment. I agree with much that has been urged by the Law Officers of the Crown with regard to the difficulties of proof that may

LAND COMMISSION.

April, 1906.

arise from the decision that I am about to give. I agree that there may be a contest between the Treasury and the Estates Commissioners as to the amount to be attributed in individual cases to improvements executed by, or under the direction, or with the aid and assistance of, the Estates Commissioners. But the fact that the task may be, in some cases, a difficult one is not sufficient to justify the Court in saying that the task is not to be attempted at all. According to my reading of the Act of Parliament it ought not to be a matter of much difficulty in many if not in the majority of cases. As to s. 6 (4), the meaning appears to me to be absolutely clear. The sub-section provides that, "in the case of a congested estate as defined by this section, if the Land Commission, with the consent of the owner, certify to the Lord Lieutenant that the purchase and re-sale of the estate are desirable in view of the wants and circumstances of the tenants thereon, then the Land Commission may purchase the estate for a price to be agreed upon, and in such case the condition in this section as to re-sale without prospect of loss may be relaxed to such extent as the Lord Lieutenant may determine." I attribute to this section the meaning suggested by the Law Officers. It is open to no other interpretation but that the Land Commission may, with the consent of the Lord Lieutenant, agree to give to the vendor a higher price for the estate than that

for which they can possibly hope to re-sell the estate, in the same condition, to the tenants, and I agree that at the time the Lord Lieutenant relaxes the condition as to re-sale without prospect of loss the price is not fixed or determined. It can only be determined when the Land Commission, having obtained the sanction of His Excellency, act under the authority of the sub-section and agree to buy at a price agreed upon. It may be that the Land Commission will make an under-estimate of the estate as it stands for the purpose of re-sale. There is nothing in the section to prevent them from going beyond their own estimate of the price at which they propose to re-sell. If, having given £34,000 for the estate, and having obtained the sanction of the Lord Lieutenant to re-sell at a loss of 10 per cent., they find themselves able to re-sell at a loss of not more that 6 per cent., there is nothing in the Act of Parliament to prevent them from doing so. But that does not conclude the matter at all. The price is the price of the congested estate. The price is to be agreed upon between the Estates Commissioners and the vendor, and what is to be the subject-matter of the purchase and re-sale under the section is the estate. The price means the price of the estate. I now turn to s. 44, which is the complement of s. 6 (4). S. 44 (1) provides that: "On the completion of the re-sale of any congested estate purchased by the Land Commission, an account shall be

LAND COMMISSION.

April, 1906.

prepared showing the profit or loss in connection with the purchase and re-sale of the whole of the congested estates purchased and re-sold up to date." Sub-s. 2 provides that: "If the account shows on the whole of the transactions a net loss, that is to say, an excess in the amounts paid by the Land Commission over the capital sums realised by the Land Commission for re-sales, interest at the rate of two and three-quarters per cent., and sinking fund at the rate of ten shillings per cent. per annum on the amount of the said net loss, within a limit of ten per cent. per annum of the aggregate sums realised by the re-sale of the estates, shall, in accordance with rules made by the Treasury, be paid as part of the expenses of the Land Commission, and credited to the Irish Land Purchase Fund until the amount of the loss is discharged." Sub-s. 3 provides that: "In calculating the profit and loss on the purchase and re-sale of congested estates, no account shall be taken of any money expended by the Land Commission for the benefit or improvement of the estates, nor of any increases of price obtained by them in consequence of such expenditure." In my opinion sub-s. 3 relates back to sub-s. 1. What I understand by sub-s. 3 is that, in taking an an account of profit and loss, regard must be had to the price at which the estate was bought from the vendor and the price at which it was

re-sold in its original condition, exclusive of and without bringing into the account any sums expended by the Land Commission for the benefit or improvement of the estate, or of any increase of price obtained by them in consequence of such expenditure. I cannot think that the sub-section means that the Land Commission are to treat the matter as one of no importance, of "no account," in the American humorist's phrase, and are to bring into the account, for the benefit of the Treasury, the amount by which the value of the estate has been enhanced, the price having been increased by the improvements executed by them. Take a concrete illustration. In the case before me, assuming that the purchase-price is £34,133, assuming that the price for which the estate has been re-sold as it was bought is £31,030, which means a loss of 10 per cent., assuming that the Lord Lieutenant has authorised the Land Commission under s. 6 (4) to incur that loss, and that it has been legitimately incurred, then I think that the excess of the amount paid by the Land Commission over the capital sum realised by the Land Commission on re-sale would come within the provisions of s. 44 (1) and (2), and advances made out of the Reserve Fund for the improvement of the estate should not be taken into consideration on one side or the other. However, that interpretation does not solve the entire difficulty. We come

LAND COMMISSION.

April, 1906.

back to the bed-rock question of recoupment, and the question whether the amount expended under the circumstances stated in the minute of the Estates Commissioners *can* be recovered under s. 43 (3). There is no section in the Act dealing with recoupment except s. 43 (3). I have read it, and considered it in the light of the arguments addressed to me, and it appears to me clear—so clear in fact that at one stage of the argument I almost doubted whether I might not have overlooked some qualification of the plain language of the sub-section. The sub-section authorises the recoupment of advances made by the Estates Commissioners out of the Reserve Fund, and, in my judgment, applies in cases of non-congested estates as well as of congested estates, whether, in the case of congested estates, the estate is re-sold in its original state at the price paid to the vendor or is sold at a price within the limits laid down by the Lord Lieutenant, but below the price paid to the vendor. I have been so impressed with the importance of the case and the necessity of having the matter disposed of at the earliest moment, finally and irrevocably, here or elsewhere, so that the Estates Commissioners may know whether they can take the course that the present case indicates they desire to take—namely, to give what counsel for the Treasury describes as a double benefit to congested estates purchased by them—the benefit

of s. 6 (4) and the benefit of an advance out of the Reserve Fund, that I decided to give my decision at the close of the arguments. It is plain that the Estates Commissioners have felt a great difficulty in the matter. They have asked me to give a decision in the present case. They have indicated that they consider the matter as one of great importance. The Law Officers intimated that they would be glad if my decision could be given at the earliest possible moment. I, accordingly, state my opinion. I think that s. 43 (3) is a section apart—a code in miniature. It provides for the case set forth in the case stated by the Estates Commissioners. I hold, as a matter of law, that the words "enhanced price" and "increase of price consequent on the improvements" relate to the enhanced price of parcels of land or the increased price of parcels of land consequent on the improvements. The suggestion that the recoupment of the Reserve Fund is to be tied up under Treasury regulations until the congested estates have been sold, and an account taken under s. 44 (1), not merely of one estate, but of every congested estate purchased and re-sold up-to-date, would, to my mind, be a strange thing. All difficulty, however, is removed by the Act of Parliament. Assuming that I am right in my view that the Treasury are bound to carry out by their regulations the object and intention of the Legislature,

LAND COMMISSION.

April, 1906.

then the Act means what it says in s. 43 (3). In my opinion it is the enhanced price of the parcels consequent on the improvements that is referred to in the section. It is only on account of the difficulty of ascertaining what is the increase of price of a parcel consequent on the improvements that I entertain any doubts as to what otherwise appears to be so clear. It is plain that all must be estates purchased and re-sold by the Land Commission. Is there in the case of a non-congested estate any difficulty in ascertaining what is the enhanced price? None whatever. The tenant has agreed to purchase, at a price, the holding as it stands. The Land Commission subsequently agree to expend money on the dwellinghouse. The Land Commission agree to sell the holding at a price increased by the value of the dwellinghouse. The purchase-price is enhanced to that extent, as is also the purchase annuity. It is clear that the National Debt Commissioners, in getting in the instalment annuities, are getting back the enhanced price paid by the tenant by reason of the erection of the dwellinghouse. The Legislature says that under such circumstances the National Debt Commissioners are to advance such sums as represent the increase of price. If this provision were not inserted the purchase annuity would go back, but so much of the annuity as represented the amount of the advance out of the Reserve Fund would go into the coffers

of the State and not to the Reserve Fund. Is there any difference in the case of a congested estate? I see no difference. If the Land Commission agree with the tenant to re-sell to him his holding (A) as it stands, without a dwellinghouse, at a particular price, and if they agree that they will erect for him at a certain cost a suitable dwellinghouse, and complete the agreement by inserting a proviso that he shall pay an increased purchase-price (B) for the holding with the dwellinghouse, the question of what is the enhanced price is a mere matter of arithmetic. The difference between the prices (A) and (B) is the sum that must be recouped by the National Debt Commissioners to the Reserve Fund. I think that my decision is in strict accordance with the express provisions of the 43rd and 44th sections. It appears to me that the purchase annuity in the illustration given will include a sum that is attributable to the amount advanced out of the Reserve Fund, and the Treasury would, if my decision were not correct, be getting the benefit of the portion of the annuity so attributable. I shall answer the first question which, in my opinion, covers the entire ground and renders it unnecessary to reply to the second.

The following was the answer embodied in the order:—In the circumstances stated I hold that any sums expended out of the Reserve Fund on the improvement of parcels of the estate should, if the sale of such parcels results in an enhanced

LAND COMMISSION.

April, 1906.

price, be recouped in the manner provided for by s. 43, sub-s. 2 and 3, to the extent represented by the increase of the price of said parcels consequent upon such improvement.

Solicitors: *Wm. M. Lane; E. C. Jameson.*

[*Note up on pp.* 1063 *and* 1099 *of Cherry's Irish Land Act*, 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of CHARLES EDWARD FAIR.

LAND COMMISSION.

March, 1907.

March 14, 1907.—*Land Purchase Acts—Practice—Tenant-for-life acting as solicitor—Profit costs—Trustee—Settled Land Act*, 1882, *s.* 53.

The tenant-for-life of an estate, who was a solicitor, sold the estate under the provisions of the Irish Land Act, 1903, *and acted by himself and by his town agent in negotiating and carrying out the sale. On a question arising as to his right to be allowed his costs out of the purchase-money :*

Held, *that he was only entitled to the outlay, together with one-half the profit costs, which it had been agreed should be paid to the town agent.*

Question arising on the preparation of the schedule. The estate sold was situate in County Westmeath, and the vendor, the tenant-for-life of the estate, was a solicitor practising in Athlone, in the said county. The vendor acted both directly and through his town agent in negotiating and carrying out the sale, and claimed that the ordinary costs of sale should appear on the schedule in their usual priority, as payable to him in his capacity as the solicitor having

LAND COMMISSION.

March, 1907.

carriage of the sale, but the Examiner raised a question as to whether any of the said costs should be borne by the estate under the circumstances, on the ground that the tenant-for-life was in the position of a trustee under s. 53 of the Settled Land Act, 1882. It appeared that the arrangement between the vendor and his town agent was that the latter should get half the profit costs.

Denning for the vendor.—Section 53 of the Settled Land Act, 1882, does not apply to the present case, for the tenant-for-life was acting for all the parties interested. The tenant-for-life was acting under a statute enabling tenants-for-life to sell, and on behalf of all parties. But, even if it should be held that the tenant-for-life is a trustee, and as such is not entitled to the entire costs, still a substantial part of the work was done by his town agent, and the costs of so much of the work as was done by the town agent should be allowed. In a case where trustees sold an estate and the tenant-for-life acted a ssolicitor, his full costs were allowed by the present Master of the Rolls. The question is not affected by the Solicitor Mortgagee Act, as the operation of that statute is confined to mortgagees.

Authorities cited:—Settled Land Act, 1882, s. 53; *In re Smith's Estate*, [1894] 1 Ir. 60; *Burge* v. *Brutton*, 2 Hare 373; *York* v. *Brown*, 1 Collyer 260.

WYLIE, J., ordered that the full outlay should

be allowed, together with the moiety of the profit costs, to which the town agent was entitled under the agreement between him and the vendor.

Solicitor for the vendor : The vendor in person.

[*Note up on p.* 1082 *of Cherry's Irish Land Act*, 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of the REV. JOHN LYLE.

LAND COMMISSION.

April, 1907.

April 26, 1907.—*Land Purchase Acts—Mines and minerals—Irish Land Act,* 1903—*Meaning of expression "time of sale" in s.* 99—*Mines being worked and developed by vendor within meaning of s.* 99 (*b*)—*Agreement reserving mines and minerals to vendor*—3 *Edw. VII., c.* 37, *ss.* 13–99.

The expression "time of sale" in s. 99 *of the Irish Land Act,* 1903, *means the time of the agreement for sale. Accordingly, where in an agreement for the sale of a holding under the provisions of the Irish Land Act,* 1903, *the mining rights were reserved to the vendor, and where it appeared that the mines underlying the said holding had formerly been worked under a lease which expired seven years prior to the said agreement, and that continuous negotiations for the grant of a new lease of the mines had since been carried on by the vendor, but the new lease had not been executed at date of the agreement:*

Held, *that the mines were being worked and developed by the vendor at the time of sale within the meaning of s.* 99 (*b*).

LAND COMMISSION.

April, 1907.

Questions submitted by the Estates Commissioners for the decision of the Judicial Commissioner as to whether certain mines underlying a holding comprised in an estate sold under the Irish Land Act, 1903, were being worked and developed by the vendor at the time of sale within the meaning of s. 99 (*b*) of that Act. The agreement for sale of the holding provided that the mining and mineral rights should be reserved to and vested in the vendor. The facts are stated in the judgment.

The Attorney-General, *The Solicitor-General*, and *Dudley White* for the Treasury.

Moore, K.C., and *Leech* for the vendor.

Wylie for the tenant.

Authorities cited.—*Prior Wandesford's Estate*, 38 Ir. L. T. R. 168; *Bagot* v. *Bagot*, 32 Beav. 509; *M'Naul's Estate*, [1903] 1 Ir. 250; *Bateson's Estate*, [1895] 2 Ir. 559; *Edinburgh Life Assurance Co.'s Estate*, 41 Ir. L. T. R. 61.

WYLIE, J.—I have had this question so recently before me, and have so fully considered all the points now raised and argued by the Treasury, that I think nothing would be gained by reserving my decision. Two questions arise. The first is—What is meant by the expression "time of sale" in s. 99 of the Act of 1903? I have no doubt that, having regard to the different sections of the Land Purchase Acts and this particular section, and also to the forms and

LAND COMMISSION.

April, 1907.

rules for carrying out sales, it means the time of the agreement for sale, to be carried out under the Land Purchase Acts. Accordingly, the question as to whether mining rights are in the vendor within the meaning of s. 99 must be determined as of the date of the agreement for sale; I do not see how an agreement in Form F could be carried out unless it deals with existing rights. The only question, therefore, which remains for determination is, whether the case comes within s. 99 (*a*) or (*b*)? Now, s. 99 provides that "Nothing in this Act shall affect (*a*) any 'mineral rights' which are not in the possession or enjoyment of the vendor at the time of sale; (*b*) any mine or quarry which is being worked or developed by the vendor at the time of sale." On the facts stated in this case, were the mines being worked or developed by the vendor at the time of the agreement for sale within the meaning of s. 99 (*b*)? The facts stated are shortly these:—On Feb. 10, 1905, the vendor agreed to sell a holding situated at Killygreen Lower, portion of the estate for sale in this matter, to Annie Stewart, the tenant thereof, in fee-simple. By the sixth paragraph of the said agreement it was provided that the exclusive right of mining and taking minerals within the meaning of the Irish Land Act, 1903, and of digging and searching for the same, should be exclusively reserved to the vendor. This agreement was subsequently, on March 22, 1905, lodged in the office of the Estates Com-

missioners, but the said holding has not yet been vested in the said Annie Stewart. Underlying the lands of Killygreen Lower, of which the said holding forms a part, are valuable mines of iron ore. It is alleged by the vendor that these mines were being worked or developed by him at the time of sale. The evidence relied on as proving that these mines were so worked or developed is contained in three affidavits of Sydney James Lyle, land agent for the vendor. These affidavits, which have not been contradicted, appear to the Estates Commissioners to justify the following statement of facts. By indenture dated July 27, 1878, and made between the vendor, of the one part, and Benjamin Townson, of the other part, the vendor leased the mines, delphs, quarries, veins and seams of iron, lying or being within or under all the lands of the vendor in, amongst other townlands, the said townland of Killygreen Lower, to the said Benjamin Townson, for a term of twenty-one years, from Nov. 1, 1877, subject to the payment of the rent and the royalty therein mentioned. Under this lease rent and royalties were paid to the vendor. After this lease expired, the said mines were not worked for several years, owing to the depression in the iron trade in the country. In the year 1900, and subsequently, negotiations were carried on with the North Antrim Iron Company, and with a number of other miners, prospectors, and mining engineers, for the grant of leases

LAND COMMISSION.

April, 1907.

of such mines to them. These negotiations fell through, but at the date of the agreement for sale of Feb. 10, 1905, negotiations were pending for a lease to a Mr. Foulis. On Sept. 1, 1905, an agreement for a mining lease was entered into by the vendor with Mr. Frederick Hall. I do not think that the subsequent grant of the lease affects the question, except in so far as it shows that, at the time of the agreement for sale, there was a *bona fide* intention on the part of the vendor to resume the working of the mines, and the question is—was there a working or development of them within the meaning of s. 99 (*b*) ? The consideration then arises, when mines have been worked under lease up to a period before the sale, what state of facts shown to exist at the time of the agreement for sale will be sufficient to enable me to hold that the mines were being worked or developed at that time. I think if it is clearly shown that the vendor had not abandoned his intention to exercise his rights of mining, and if at the time of the agreement for sale it appears that certain acts were being done by him clearly showing a *bona fide* intention on his part to carry on the working of the mines, it would be evidence that they were being worked or developed by him at the time of sale within the meaning of s. 99 (*b*). It seems to me that if for a period of two months or twelve months, or even two years, prior to the date of sale the working of the mines had, from accident or other cause,

been suspended, it would be absurd to hold that for that reason alone the vendor must be taken to have abandoned the mines, so as to take out of him his right to them, and exclude him from the provisions of s. 99 (*b*), where he has shown a clear intention to continue their working and development. On the facts disclosed in the present case I do not think it would be reasonable to hold that, at the time of sale, the mines were not being worked or developed by the vendor. Accordingly, I hold that the vendor was entitled to reserve them under the agreement, and that they could not vest in the Land Commission.

Solicitor for the Treasury: *Wm. M. Lane.*

Solicitors for the vendor: *Crookshank, Leech & Davies.*

Solicitor for the tenant: *D. MacLaughlin.*

[*Note up on pp.* 1070 *and* 1156 *of Cherry's Irish Land Act,* 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of WILLIAM DIGBY LONGFIELD AND OTHERS.

LAND COMMISSION.

April, 1907.

April 17, 23, 1907.—*Land Purchase Acts—Purchase of land by Congested Districts Board—Power of Congested Districts Board to contract—Enforceability of contract—Powers given by Congested Districts Board (Ir.) Act,* 1893—*Effect of Irish Land Act,* 1903, *s.* 79—*Death of vendor before lands vested in purchasers—Who entitled to be certified as being the persons to be dealt with as owners—Portion of lands sold vested in trustees for sale—Whether trustees for sale or tenants-for-life should be certified*—56 *&* 57 *Vict., c.* 35—3 *Edw. VII., c.* 37.

The powers of the Congested Districts Board to purchase lands are derived from the Congested Districts Board (Ir.) Act, 1893, *and s.* 79 *of the Irish Land Act,* 1903, *does not confer any new power of purchase, but merely prescribes the manner in which sales under the later Act are to be carried out. Accordingly, agreements entered into between the Board and vendors under s.* 79 *of the Irish Land Act,* 1903, *are valid and enforceable agreements conditional on the Estates Commissioners certifying that the*

vendors may be dealt with as the owners of the lands.

Where the lands are vested in trustees for sale, tenants-for-life who have obtained an order of the Court of Chancery giving them liberty to exercise the powers of sale conferred by s. 63 *of the Settled Land Act,* 1882, *are the proper persons to be certified as the owners.*

Question submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. By agreement dated Aug. 3, 1905, and made between the vendors, William Digby Longfield, senr., Charles Matthew Longfield, Robert Ormsby Longfield, Thomas Henry Longfield, William Digby Longfield, junr., and Harriett Elizabeth Osborne, of the one part, and Charles Kennedy and William Purser Geoghegan, trustees of the Congested Districts Board for Ireland (thereinafter called the purchasers), of the other part, it was agreed that in accordance with the provisions of the Irish Land Act, 1903, the vendors should sell and the purchasers should purchase the fee-simple and inheritance of the lands therein particularly mentioned for the sum of £40,100. The further terms of the agreement and the subsequent proceedings on foot thereof are sufficiently stated in the judgment. The lands mentioned in the said agreement had been originally held in fee-simple by William Longfield, who died on July 21, 1870, having by his will

LAND COMMISSION.

April, 1907.

devised the same to his five sons and their heirs in equal shares. John Longfield, one of the said sons, died on Jan. 20, 1886, having by his will devised all his real estate to the vendors, Robert Ormsby Longfield and Thomas Henry Longfield, upon trust for sale, and after certain payments thereout to hold the residue in trust for the vendors William Digby Longfield, junr., and Harriett Elizabeth Longfield (now Osborne), if both should attain the age of twenty-one years (which eventually happened), in equal shares, the share of each to be held for them for life, and afterwards for their children as therein-mentioned. In the said originating request the said William Digby Longfield, junr., and Harriett Elizabeth Osborne were described as tenants-for-life of their respective shares. By order of Mr. Justice Barton, dated June 19, 1906, the said William Digby Longfield, junr., and Harriett Elizabeth Osborne were given liberty to exercise the powers of sale conferred by s. 63 of the Settled Land Act, 1882. On Oct. 28, 1906, the vendor, Thomas Henry Longfield, died intestate, leaving him surviving the said William Digby Longfield, junr., his heir-at-law; and on Feb. 19, 1907, letters of administration were granted to the vendors Charles Matthew Longfield and Robert Ormsby Longfield. The following questions of law were submitted:—1. Should the vendor, Robert Ormsby Longfield, as surviving trustee for sale of the will of John Longfield, or should

the vendors, William Digby Longfield, junr., and Harriett Elizabeth Osborne, as persons entitled for life to the income derived from the proceeds of such sale, having obtained the leave of the Court, be certified by the Estates Commissioners to be the persons who may be dealt with as the owners of the land in accordance with the provisions of Part I. of the Irish Land Act, 1903, in respect of the share formerly the property of the said John Longfield? 2. Should the personal representatives or the heir-at-law of the said Thomas Henry Longfield, deceased, be certified by the Estates Commissioners to be the persons who may be dealt with as the owners of the land in accordance with the provisions of Part I. of the Irish Land Act, 1903, in respect of the share formerly the property of the said Thomas Henry Longfield?

Oulton, K.C., and *Meredith*, K.C., for the vendors and the personal representatives of Thomas Henry Longfield.

Molony, K.C., and *Chaytor*, K.C., for the heir-at-law of Thomas Henry Longfield.

Authorities cited.—*Sherlock's Estate*, [1899] 2 Ir. 561; *Athy Guardians* v. *Murphy*, [1896] 1 Ir. 65; *Crosbie's Estate*, [1906] 1 Ir. 515; *Edwards* v. *West*, 47 L. J. Ch. 463; *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535; *Mayor of Kidderminster* v. *Hardwicke*, L. R. 2 Ex. 13.

WYLIE, J.—In this case, by agreement dated

LAND COMMISSION

April, 1907.

Aug. 3, 1905, William Digby Longfield, Charles Matthew Longfield, Robert Ormsby Longfield, Thomas Henry Longfield, William Digby Longfield, junr., and Harriett Elizabeth Osborne agreed to sell to the Congested Districts Board the lands mentioned in the said agreement. That agreement is in a particular form which the Estates Commissioners have prepared for agreements of this class. It is an agreement between the vendors and the purchasers to sell and purchase the fee-simple of the premises in accordance with the Irish Land Act, 1903, for a sum of £40,100, to be paid in pursuance of the provisions of that Act. In order to carry out the agreement the Congested Districts Board undertake to declare the lands fit to be regarded as a separate estate. The vendor agrees to accept a certain sum for rents in arrear. The agreement provides that the rents of the tenanted lands and possession of the untenanted lands shall go to the Congested Districts Board on a certain date; that interest at the rate of three and a half per cent. shall be paid after that date; and that rates and taxes shall be apportioned. It also provides for the manner in which the sporting and mining rights shall be dealt with, and for the adjustment of the rights of the parties in the event of the Estates Commissioners deciding that the case does not come under s. 18; in other words, in the event of the vendors being unable to satisfy the Estates Commissioners as to *primâ facie* title. The

vendors agree to prepare and file an originating request, and to enter into the agreement referred to in the 79th section, and to execute all documents necessary under the Act of 1903. Now, prior to that agreement the Congested Districts Board got possession of the untenanted lands and entered into receipt of the rents and profits of the tenanted lands. The originating request was prepared and lodged by the vendors, pursuant to the agreement, on Aug. 21, 1905, and the title was lodged on March 22, 1906. By deed dated May 17, 1906, the vendors, in consideration of £142, assigned certain arrears of rent. Rulings on the *primâ facie* titles were issued on May 25, 1906, and pursuant to these rulings notice was issued and published by the Estates Commissioners in the *Gazette* on July 6, 1906. [Reads notice.] On the expiration of fourteen days after the publication of that notice it was open to the Estates Commissioners to certify the title and prepare the agreement specified in the 79th section, when the whole transaction could have been completed within a month. On Oct. 28, 1906, long after the expiration of the fourteen days, the vendor, Thomas Henry Longfield, died. At the date of his death the certificate as to *primâ facie* title had not been given, and the agreement had not been prepared, or, at all events, had not been executed. Now, it is contended on behalf of the heir-at-law of the deceased vendor, who was entitled to one-fifth, that the agreement of

LAND COMMISSION.

April, 1907.

Aug. 3, 1905, was voidable, and one from which the vendor could have withdrawn voluntarily at any time up to the signing of the agreement referred to in s. 79. As I understand the argument of Mr. Molony, it was based principally on the ground that the Congested Districts Board had no powers to purchase this estate except those conferred by s. 79, and that in order to enable them to enter into a valid agreement under s. 79, the Estates Commissioners must first have certified that the vendors might be dealt with as owners of the land in accordance with the provisions of Part I. of the Act of 1903, or otherwise. Now, I think the fallacy of that argument lies in this assumption, for, in my opinion, the power of the Congested Districts Board to purchase is not conferred on them by s. 79 of the Act of 1903, but by the Act of 1893. The Congested Districts Board could have purchased the estate outside of the Act of 1903 altogether, and it was quite open to them to enter into an agreement, under the Act of 1893, to purchase in accordance with the provisions of the Act of 1903. Section 79 is not a section conferring powers of purchase on the Congested Districts Board, but it is one giving them power to contract in a certain manner so as to attach certain results to the purchase, one of which is the right to the bonus. In my opinion the contract was a valid contract entered into between the vendors and the Congested Districts Board under powers conferred on the

Congested Districts Board by the Act of 1893, and they have taken every proper step to carry out that contract under the Act of 1903. I am, therefore, of opinion that the contract at the date of the death of Thomas Henry Longfield was one which the Congested Districts Board could have enforced against him, and one which, if subsequently carried out, would operate to convert the estate from realty to personalty at the date of his death. His personal representatives are, therefore, the proper persons to be substituted for him as vendors. That is all I decide at present on this point, as the contract has not yet been completed. If the contract is carried out it is, I think, admitted on both sides that it will have the effect of converting the property as from its date. As to the other question, the proper persons to carry out the sale on the facts of the case are the equitable tenants-for-life, William Digby Longfield, junr., and Harriett Elizabeth Osborne, under the liberty given to them by the order of Mr. Justice Barton.

Solicitors for the vendors and the personal representatives of Thomas Henry Longfield: *Longfield, Kelly & Armstrong.*

Solicitor for the heir-at-law of Thomas Henry Longfield: *G. H. Lister.*

[*Note up on p.* 1142 *of Cherry's Irish Land Act,* 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of MARCUS B. ARMSTRONG.

LAND COMMISSION.

May, 1907.

May 6, 1907.—*Land Purchase Acts—Practice—Sales to the Congested Districts Board—Agent employed to negotiate sale—Negotiation fee—Irish Land Act*, 1903, *ss.* 23 (12), 79.

There is no provision in the Irish Land Act, 1903, *for the payment of negotiation fees to agents for negotiating sales of estates to the Congested Districts Board, and, accordingly, on the distribution of the purchase-money in such cases, claims for negotiation fees cannot be allowed on the schedule.*

Question arising on the ruling of the final schedule of incumbrances. The estate, which was subject to the trusts of a certain settlement, had been sold by the tenant-for-life to the Congested Districts Board under the provisions of the Irish Land Act, 1903, and it had been agreed that a negotiation fee should be paid to Mr. Anthony F. Maude, the agent who had been employed by the vendor to negotiate the sale. The negotiation fee had been sanctioned by the Estates Commissioners, and the trustees of the settlement had consented to its being paid, but

a question now arose as to whether it should be provided for on the schedule.

Garrett Walker, K.C., for the vendor.

Jellett, K.C., for the trustees of the settlement and the agent.

WYLIE, J.—I cannot allow the negotiation fee on the schedule. A negotiation fee may be paid out of the purchase-money under s. 23 (12) of the Act of 1903, in the case of the sale of an estate to *persons other than the Land Commission.* Estate there means an estate as declared by the Estates Commissioners, and is, therefore, outside s. 79. The sub-section could only be made applicable to a Congested Districts Board case by its incorporation with s. 79. Sub-section 2 of s. 79 provides that the purchase-money of land vested in the Congested Districts Board shall be distributed in accordance with the provisions of Part I. of the Act with respect to the distribution of the purchase-money of land *vested in the Land Commission.* Accordingly, the provisions of s. 23 (12) do not apply to this case. I will pay the residue to the trustees of the settlement without prejudice to any claim which the agent may have against the funds in their hands.

Solicitor for the vendor: *S. Gordon & Sons.*

Solicitors for the trustees and the agent: *Moore, Keily & Lloyd.*

[*Note up on pp.* 1083 *and* 1142 *of Cherry's Irish Land Act*, 1903.]

LAND COMMISSION.

(Before FITZGERALD, J.)

J. ROCHE, Landlord; J. FITZPATRICK, Tenant.

LAND COMMISSION.

March, 1907.

March 25, 1907.—*Land Law Acts—Letting in conacre—Whether a subletting when not confined to green crops—Land Law (Ireland) Act,* 1881, *ss.* 2, 5—*Tenant in occupation of the holding—Application to fix fair rent.*

A letting in conacre is not a subletting, even though the land is not let for the purpose of, or used solely for, the growing of potatoes or other green crop, and, accordingly, where a statutory tenant had let a considerable portion of his holding for corn crops and for grazing:

Held, *that the tenant had not broken the statutory condition against subletting, that he was in occupation of his holding, and was entitled to have a fair rent fixed for a second statutory term.*

The facts are stated in the judgment.

Battersby, K.C., for the landlord.—By ss. 2 and 5 of the Land Act, 1881, lettings of conacre are not to be deemed sublettings if they are let for the purpose of, and are solely used for, the growing of potatoes or other green crops. These sections alter the law, as prior to their enactment such a letting was not a demise of land, but only an

easement: *Dease* v. *O'Reilly*, 8 Ir. L. R. 52; *Booth* v. *M'Manus*, 12 I. C. L. R. 418, and could never be a subletting; therefore, the true and only meaning of the sections is that for the future land in conacre not let for the purpose of growing potatoes or green crops shall be deemed to be a subletting for the purposes of the Act. In this case the lettings in conacre were for corn crops and for grazing, and having been so let, without the consent of the landlord in writing, the tenant is subject to all the penalties to which he is liable for the breach of the prohibition. He cannot, therefore, have a fair rent fixed.

De Renzy for the tenant.—If there were anything in the point it would have been raised before. *Cur. adv. vult.*

FITZGERALD, J.—In this case the tenant stated that he worked about seventy statute acres, which would be a little more than half the farm, and that the remainder he set in conacre. According to the auctioneer's bill he advertised for letting in conacre, in 1903, the following quantities, which I understood were in Irish acres:—10a. manured land; 23a. lea land (for corn crop); 20a. 2r. lea land; 14a. good land (for green crop); 10a. for eleven months' grazing; 23a. for grazing to middle of January. That makes 67 acres for crop and 33 acres for grazing. The tenant states he was unable to let all the land advertised, and only let about 80 acres. On being recalled he said that in 1903, 32 acres were let for corn

LAND COMMISSION.

March, 1907

crop; that in 1904, 30 acres were let for crop, and that in 1905, 25 acres manured land were let for corn, and 18 acres lea land let for corn. That is in 1905 (the year in which the rent was fixed by the Sub-Commission) 43 acres let for corn. The landlord contends that the letting by way of conacre for a corn crop is a subletting within the meaning of the Land Law Acts. According to the assessor who visited the holding in July, 1906, 62 acres were then let in conacre—viz., 34 acres for oats, 14 acres for oats after green crop, and 14 acres for green crop—about 22½ acres let in grazing for eleven months. Upon these figures a very serious question would arise—whether the tenant could have a fair rent fixed if a letting in conacre for a corn crop is to be deemed a subletting within the meaning of the Land Act of 1881, so that the tenant would not be in occupation of the land so let in conacre. The question to be determined is whether the words used in ss. 2 and 5 of the Land Act of 1881, that "the letting in conacre of land for the purpose of its being solely, and which shall be solely, used for the growing of potatoes and other green crops, the land being properly manured, shall not be deemed a subletting for the purpose of the Act," imply that any other sort of conacre letting, such as in this case, for a corn crop, must be considered a subletting within the meaning of the Act, and have the effect of placing the tenant who makes such a conacre letting out of occupation of the part so

let, or whether it leaves to the Court to ascertain what the real nature of the transaction is—whether in fact there has been any letting of the land or only a licence by the tenant to another person to sow and reap a single crop. By s. 18 of the Landlord and Tenant Act, 1860, a letting in conacre is recognised as distinct from sub-letting, and a letting in conacre does not violate a covenant against subletting, nor even a covenant not to part with the possession; notwithstanding a letting in conacre the owner of the land retains the occupation of the premises: *Booth* v. *M'Manus*, 12 I. C. L. R. 418. Section 15 (3) of the Land Act of 1870 declares that no compensation shall be payable under the Act in respect of a letting in conacre; it places a letting in conacre outside the scope of the Act. The Land Act of 1881, by s. 57, defines "tenant" to be a person occupying land under a contract of tenancy, and declares that where a tenant sublets part of his holding with consent he shall be deemed to be still in occupation of his holding. The landlord urges that the provisions of ss. 2 and 5 are in the nature of negative enactments, declaring that lettings in conacre for potatoes and green crops, after proper manuring, are not to be considered sublettings for the purpose of the Act of 1881, and that it follows from this that all other classes of conacre lettings, such as lettings for a corn crop, must be considered as sub-lettings so as to place the person making them out of occupation. Sections 2 and 5 are sections

LAND COMMISSION.

March, 1907.

not directly dealing with the status of the tenants to fix a fair rent; they are merely sections restricting the subletting; the section regulating the status of the tenant is that already mentioned, s. 57. There is no suggestion in this case that there has been any continuous letting for several years to the same tenant of some parcels of ground for crop under which a question might be raised that the real transaction was a subletting, although under the form of a conacre letting. On the whole I cannot, in the face of *Booth* v. *M'Manus*, which lays down that, notwithstanding a letting in conacre, the person making it remains in occupation of the land so let, hold that the tenant was not in occupation in this case.

Solicitor for the vendor: *C. H. Thorp.*

Solicitor for the tenant: *P. J. Byrne.*

[*Note up on pp.* 243 *and* 253 *of Cherry and Wakely's Land Acts, 3rd Edition,* 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of H. J. B. VILLIERS STUART.

LAND COMMISSION.

July, 1907.

July 16, 1907.—*Land Purchase Acts—Irish Land Act,* 1903—*Practice—Right of way—Yearly payment to owner of servient tenement—Superior interest—Redemption.*

Where the tenants on portion of an estate sold under the Irish Land Act, 1903, *had, prior to the sales, used a certain way across the lands of an adjoining owner, which was the only mode of access to their holdings from the main road, and it further appeared that for many years a yearly payment had been made by the owners of the estate to the owners of the lands traversed by the said way in respect thereof:*

Held, *that the owner of the said lands was entitled to be placed on the schedule as the owner of a superior interest, which should be redeemed out of the purchase-money.*

Question arising on an objection to the final schedule of incumbrances. The lands sold in the matter comprised part of the lands of Kiltorcan, Co. Kilkenny, and also the lands of Manganstown, Co. Tipperary, adjoining the lands

LAND COMMISSION.

July, 1907.

of Ballydine, which were the property of the Earl of Clonmell. Agreements for the sale of the lands of Ballydine had been lodged, but the said lands had not yet been declared to be an estate. The occupying tenant of Manganstown had been for many years using a certain way across the lands of Ballydine, and it was admitted that an annual rent of 15s. had been paid by the Villiers Stuart estate to the Clonmell Estate in respect of the right of way aforesaid. It further appeared that the said way was the only means of access from the main road to the portion of the Villiers Stuart estate in question. No provision with regard to the said right of way having appeared on the final schedule, the Earl of Clonmell now objected and claimed that the said rent of 15s. should be redeemed and the redemption price thereof placed on the final schedule as payable out of the purchase-money.

Waller, K.C., for the vendor, submitted that the way in question was a right of way of necessity, and that there was no superior interest to be redeemed.

M'Gusty for the Earl of Clonmell.—A rent has always been paid for the use of this right of way, which should be redeemed. The redemption price, which we suggest, of £18 15s. can be paid direct to the Earl of Clonmell without investigation of title under s. 63 (1) of the Act of 1903, as it does not exceed £30.

WYLIE J., held that the rent of 15s., which

had admittedly been paid for the use of the right of way since 1873, was a superior interest which should be redeemed, and fixed the redemption price at £18 15s., to be paid direct to the Earl of Clonmell. He directed a note to be entered on the schedule to preserve evidence of the satisfaction of any claims by the Clonmell Estate in respect of the future user of the right of way by the purchasing tenants.

Solicitors for the vendor: *Stephen Gordon & Son.*

Solicitors for the Earl of Clonmell: *Fred Sutton & Co.*

[*Note up on p.* 1130 *of Cherry's Irish Land Act,* 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

TRUSTEES OF ELIZA JANE BARRY, Deceased.

LAND COMMISSION.

July, 1906.

July 4, 1906.—*Land Purchase Acts—Practice—Vesting order—Lands of another party included—Mistake—Rectification.*

A vesting order by which the holding of a purchasing tenant was conveyed to him under the Land Purchase Acts included a plot of land to which another person was entitled. On the application of the owner of the said plot:

Ordered, *that the vesting order should be amended so as to exclude the plot of land included by mistake as aforesaid.*

Application on behalf of Mary Anne Byrne that a vesting order, dated Feb. 9, 1905, and registered on May 4, 1905, by which certain lands, situate in the County of Dublin, were conveyed under the Land Purchase Acts to a purchasing tenant, be amended so as to exclude a plot of ground, containing 3 roods, Irish plantation measure, to which the applicant claimed to be entitled, and which had been included by mistake in the lands vested by the said vesting order, and that the costs of the application should be borne by the vendor or purchaser or both. The plot of ground in respect of which

the question arose was, with a house and offices situate thereon, demised by Greenland in the year 1872 to the predecessor in title of Mary Anne Byrne for a term of 99 years, at the rent of £12 per annum. By lease dated May 29, 1862, the said Charles Greenland demised to the predecessor in title of Eliza Jane Barry, deceased, certain lands which surrounded on all sides the plot of ground demised by the least of 1872. The lands comprised in the lease of 1862 had been in the occupation of a Mr. Coard, who purchased under the Land Purchase Acts, and by vesting order dated Feb. 9, 1905, and registered on May 4, 1905, the lands of which he was tenant, as well as the said 3 roods, Irish, included within the ambit of his holding, were vested in Mr. Coard, who now claimed to be entitled to the said 3 roods, and had threatened to plough them. The applicant alleged that only in the summer of 1905 she was put upon inquiry by Mr. Coard alleging his right to break up the land, and then became aware for the first time that her holding had been included by mistake in the lands conveyed to Mr. Coard by the vesting order. It also appeared from the affidavits that the plot of ground in question had not for a long time been defined by any boundary.

W. H. Brown, for applicant, cited Or. VI., r. 2, of the rules of Dec. 4, 1906.

Pigot for landlord and vendor.—The application is late. Nothing was done by applicant from

LAND COMMISSION.

July, 1906.

February, when the vesting order was made, until November. The boundaries of the plot claimed are not established.

Brunskill, for Mr. Coard, referred to *Quinn* v. *Hewson*, 26 Ir. L. T. & S. J. 534.

WYLIE, J., after reviewing the facts, decided that the applicant was entitled to the plot of ground claimed by her, which was admittedly included in the vesting order, and that it should be excluded, but directed that all parties should bear their own costs, as the applicant, although calling attention to the fact that she owned the plot, had delayed in taking active steps to have the mistake rectified.

Solicitor for the applicant: *Samuel Boxwell.*

Solicitors for the landlord and vendor: *Maxwell & Weldon.*

Solicitors for Mr. Coard: *A. & J. Robinson.*

[*Note up on pp.* 377 *and* 826 *of Cherry and Wakely's Land Acts, 3rd Edition*, 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of ANNA G. CRAMER ROBERTS and MARMADUKE W. C. CRAMER ROBERTS.

LAND COMMISSION.

July, Oct., 1907.

July 25, Oct. 25, 1907.—*Land Purchase Acts—Assignee of tenant-for-life—Joint vendors—Settled Land Act*, 1882 (45 & 46 *Vict.*, *c.* 38), *s.* 50—*Irish Land Act*, 1903, *s.* 48—*Bonus.*

On the sale of a settled estate (solvent as to income) under the provisions of the Irish Land Act, 1903, *the tenant-for-life named in the settlement and the assignee of all his estate and interest being joined as vendors:*

Held, *that the bonus was payable to such tenant-for-life.*

Question arising on allocation. By a settlement executed on the marriage of the vendors certain property, including the estate sold in this matter, was settled upon Marmaduke W. C. Cramer Roberts for life. He subsequently assigned, for valuable consideration, all his estate and interest in the lands sold unto his wife, Anna G. Cramer Roberts, who thereupon entered into receipt of the rents and profits. Anna G. Cramer Roberts having commenced proceedings for sale to the tenants under the provisions of the Irish Land Act in her own name, the examiner, when the matter came before him, directed that Marmaduke W. C. Cramer Roberts should be

LAND COMMISSION.

July, Oct., 1907.

joined as a vendor, and thereafter the proceedings were continued in their joint names. The estate sold was not insolvent as to income. On the ruling of the schedule the question arose whether Marmaduke W. C. Cramer Roberts, having assigned his interest, was entitled to receive the bonus. It was also suggested that the bonus should be added to the purchase-money, as the real vendor not having been in receipt of any portion of the rents and profits.

Jellett, K.C., for Anna G. Cramer Roberts.

Meredith, K.C., for Marmaduke W. C. Cramer Roberts.

Authorities cited :—*In re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96; *Lonsdale* v. *Lowther*, [1900] 2 Ch. 687; *Singleton's Estate*, 40 Ir. L. T. R. 175. *Cur. adv. vult.*

WYLIE, J.—In this case a question has been raised as to who is entitled to the bonus. The lands were settled, and the proceedings were commenced and continued up to the time the case came before the examiner in the name of Mrs. Roberts, as assignee of her husband, who was tenant-for-life under the settlement. The examiner required that the husband should be made a party to the proceedings, and since that time the proceedings have been continued in the names of both as vendors. Now I am clear, both on the statute and on the authorities, that the real vendor is the husband and not his assignee, and that the husband has a statutory

power to sell, under the Settled Land Acts, with the consent of his assignee. I think that, by her acts, Mrs. Roberts must be taken to have consented to the real tenant-for-life selling under the Act, and I must treat the husband as the real vendor under the Act. The question is—Is he entitled to the bonus? Mrs. Roberts has no claim. Section 48 provides that the bonus is to be paid to the vendor unless (*inter alia*) the estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof. Now, owing to the assignment of his life estate, Mr. Roberts was not entitled to receive any part of the rents or profits. I have, however, looked carefully into the figures, and am satisfied that the lands which have been sold, when taken in conjunction with other lands subject to the incumbrances affecting both, were not insolvent as to income, and, therefore, it was not by reason of circumstances on the estate that Mr. Roberts was not entitled to receive any rents and profits. I, accordingly, hold that the bonus is payable to Mr. Roberts, one of the two named vendors.

Solicitors for Anna G. Cramer Roberts: *Maunsell, Darley & Orpen.*

Solicitor for Marmaduke W. C. Cramer Roberts: *Wm. J. Shannon.*

[*Note up on p.* 1106 *of Cherry's Irish Land Act,* 1903.]

LAND COMMISSION.

(Before WYLIE, J.)

In the Matter of the Estate of E. C. S. KING-HARMAN.

LAND COMMISSION.

Nov., 1907.

Nov. 5, 1907.—*Land Purchase Acts—Irish Land Act*, 1903—*Turbary—Section* 21—*Powers of Land Commission under.*

The Land Commission have power to make regulations under s. 21 *of the Irish Land Act*, 1903, *authorising the cutting or making of turf on a bog included in a holding which has been vested in a purchaser who had not an exclusive right of sale, notwithstanding the fact that there was no reservation of any turbary rights in either agreement for purchase or on the Register in the Local Registry of Title.*

Questions of law submitted by the Estates Commissioners for the opinion of the Judicial Commissioner. The facts were as follows:—In this case the Estates Commissioners had purchased the estate under the provisions of s. 6 of the Act of 1903, and it had been vested in the Land Commission. Several holdings

on the estate contained large areas of bog. The practice on the estate with reference to the bogs before the date of the said purchase was that, though the bog was included in the ambit of the holding, the landlord had the right to put in other persons to cut turf on same on payment of a bog rent to the landlord, the tenant having the right to turbary for his own use only. George R. Acheson, a tenant on the estate, who had occupied his holding, containing 163a. 2r. 35p., on the terms above mentioned, had purchased the same. The said holding contained a considerable area of turbary on which, prior to the sale, the landlord had exercised the right of turbary above referred to, but the undertaking to purchase which had been signed by the said tenant contained no reference to turbary, and the holding had been vested in the said tenant without reference to turbary. The Estates Commissioners found as a fact that the holding contained more than sufficient turf for the use of the proprietor of the holding for a reasonable time. The following questions were submitted—(1) Can the Commissioners, notwithstanding that a vesting order has been actually made vesting the holding in the said George R. Acheson, and without any reservation of turbary, make regulations under s. 21 of the Act of 1903, authorising the cutting or making turf on the holding by occupiers of land in the neighbourhood of the holding, for whose requirements such turf appears to be necessary, upon such

LAND COMMISSION.
Nov., 1907.

terms as to payment or otherwise as may appear to the Estates Commissioners to be just? (2) If so, can the Estates Commissioners, in making such regulations under s. 21, direct that the payment referred to in that section shall be made to the Land Commission or their assigns?

Davidson (*Matheson*, K.C., with him) for certain purchasing tenants cited s. 21, Irish Land Act, 1903; s. 34, Land Law Act, 1906. The tenant on whose holding the bog in question is situate was a judicial tenant. The undertaking to purchase signed by him is silent as to turbary. He had not any exclusive right to turbary: *Coote* v. *Phelan*, 35 Ir. L. T. R. 196; *Wilson* v. *Gilmore*, 31 Ir. L. T. R. 75. The words of Porter, M.R., in *Ingram* v. *Mackey*, [1898] 1 Ir. R. 272, at p. 289, show the effect of s. 34 of the Act of 1896.

Dudley White for the Treasury.—Prior to the sale the landlord had a right to put other tenants in to cut turf on this bog. There is an express finding in the minute of the Estates Commissioners that the purchasing tenant had not an exclusive right to cut turf.

Featherstonhaugh, K.C., for Geo. R. Acheson.—If s. 21 was to be applied, it could only be done at time of sale, not at some indefinite time after completion. The landlord's right was incident to the reversion, but that reversion is gone: Local

Registration of Title Act, ss. 30–47. Nothing appears on the register, and the lands are vested in registered owners freed from all charges not noted on register. A purchaser for value would have no notice of these alleged rights to the turbary. The right of landlord under s. 5 of Act of 1896 was not an easement or *profit à prendre*, because they must be exercisable over lands of another person, and not over a man's own lands. Section 8 of the Act of 1885 only preserves the rights and equities of other parties.

O'Connor, K.C., for vendor.

WYLIE, J.—I am quite clear that this case is governed by s. 21 of the Act of 1903. It is thereby provided that on the sale of an estate the Land Commission can make regulations for the supply of turbary where portion of a holding consists of bog and the purchasing tenant had not an exclusive right of turbary. In the present case I don't see how we can get out of the section. As a matter of fact the landlord had rights under s. 5 of the Act of 1881, and the practice on the estate was in accordance with those rights, as stated in the memorandum of the Estates Commissioners. Therefore, the tenant had not an exclusive right of turbary on the holding, and the Land Commission may make regulations. The matter is perfectly clear. I do not think that anything in the Local Registration of Title Act affects the case, because the register shows that the lands were

LAND COMMISSION.

Nov., 1907.

purchased under the Act of 1903, and subject, therefore, to s. 21. I answer the second question, "Yes, if it appears to them just."

Solicitors for the tenants: *Frederick Croskerry & Son.*

Solicitor for the Treasury: *W. G. Towers.*

Solicitor for G. R. Acheson: *Phillip MacDermot.*

Solicitor for the vendor: *Norris Goddard.*

[*Note up on pp.* 575 *and* 599 *of Cherry and Wakely's Land Acts, 3rd Edition,* 1903; *and on p.* 1080 *of Cherry's Irish Land Act,* 1903.]